Reply Br. of 354

Filed Oct. 31, 1898.

# In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

The Farmers' Loan and Trust Company,
*Plaintiff in Error,*
vs.
The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company,
*Defendants in Error.*

Writ of Error to the Supreme Court of Illinois.

## Reply Brief on Motion to Dismiss or Affirm.

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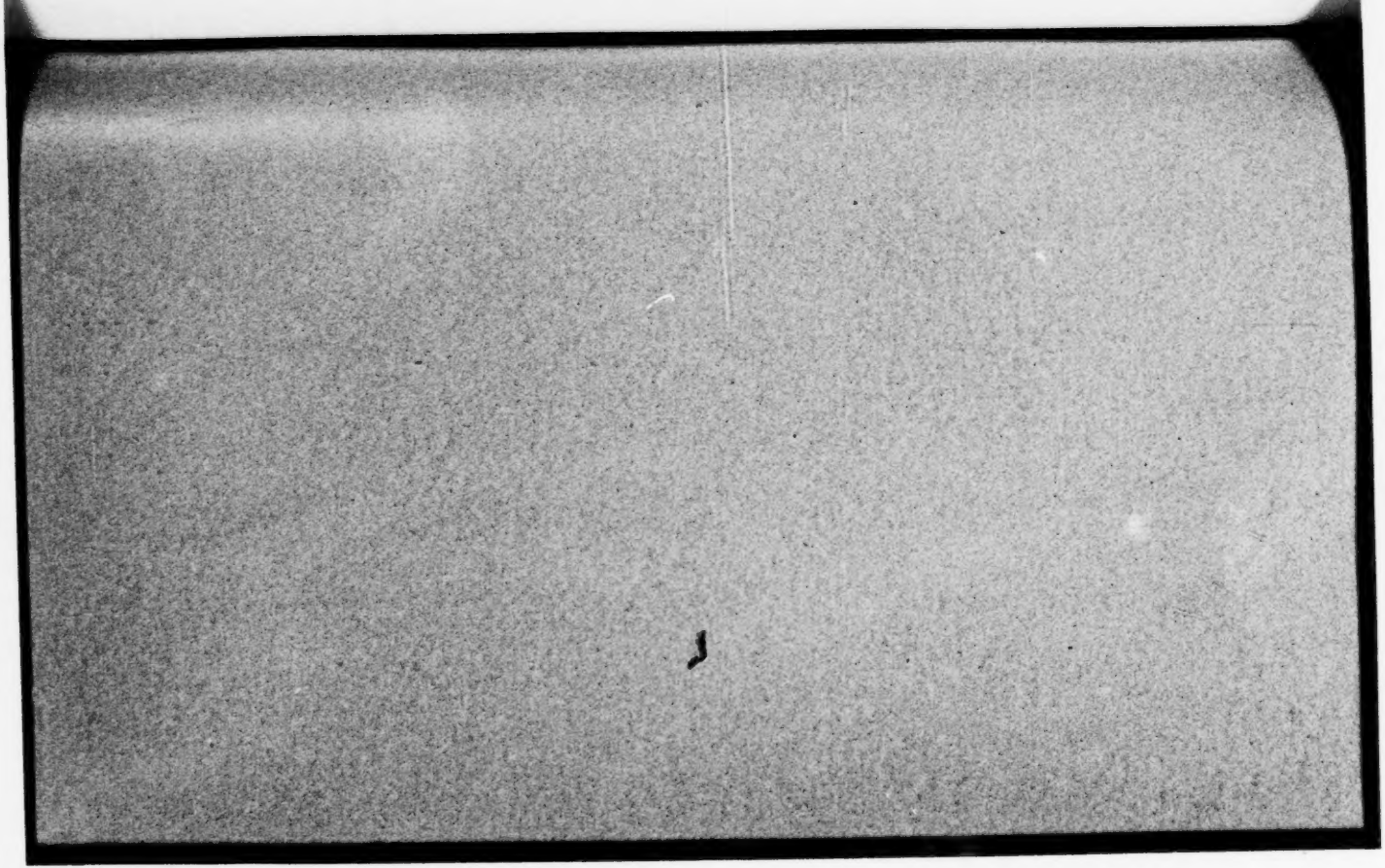

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CHICAGO:
THE GUNTHORP-WARREN PRINTING COMPANY.
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fit to require a stipulation from counsel for the Farmers' Company that no proceedings should be taken in the foreclosure case until an application should be made to this court to dismiss the writ of error. And in connection with that stipulation that a stipulation should likewise be made by the Lake Street Company that no further proceedings should be taken in the suit of the Superior Court of Cook County, Illinois. The purpose and intent of the stipulation and proceedings before Mr. Justice Brown was to permit matters to remain in *statu quo* until this court could pass upon the question as to whether or not the writ of error should have been granted. A writ of error to the highest tribunal of a State is not a matter of right, but a matter resting in the sound discretion of the court. In pursuance of the direction of Mr. Justice Brown, a stipulation was drawn by the counsel for plaintiff in error, and signed by the respective counsel, which provides that no proceedings should be taken in the Superior Court of Cook County or in the foreclosure cause, "until said Supreme Court of the United States shall decide a motion to vacate said supersedeas and writ of error." That stipulation constituted an agreement between the respective parties which the courts would enforce. The language of the stipulation is that of the counsel for the plaintiff in error, drawn, as Mr. Justice Brown will remember, hurriedly, but with the purpose and intent of submitting to the full court the question as to the right to this writ of error. Subsequent to entering into that stipulation, a further stipulation was made on September 29, 1898, and again on October 14, 1898. The stipulation of September 29th recites: "Whereas, the parties to this cause did on July 7, 1898, enter into a stipulation which is

printed at the beginning of the brief and argument prepared on behalf of the Lake Street Elevated Railroad Company on its motion to dismiss and affirm, and by said stipulation October 10, 1898, was set as the day for presenting to the court the motions mentioned in said stipulation; now, therefore, it is stipulated that said motions shall be presented to said Supreme Court on October 17, 1898, instead of October 10, 1898, with like effect as if presented on October 10, 1898, and further that said motions shall be submitted on printed briefs, neither party appearing to make oral arguments."

It will be noticed by the court that the parties in so stipulating treated the motion to vacate the writ of supersedeas and writ of error as a motion to dismiss and to affirm, and also stipulated the motion should be submitted on printed briefs. Nothing was said about any any other printed matter.

The stipulation of October 14, 1898, provides as follows: "Whereas, the parties to this cause did on July 7, 1898, enter into a stipulation which is printed at the beginning of the brief and argument prepared on behalf of The Lake Street Elevated Railroad Company on its motion to *dismiss* and *affirm*, and by said stipulation October 10, 1898, was set as the day for presenting to the court the motions mentioned in said stipulation; now, therefore, it is further stipulated that said motions shall be presented to said Supreme Court on October 24, 1898, or the first motion day thereafter, instead of October 10, 1898, with like effect as if presented on October 10, 1898; notice of said motions is hereby waived and we hereby *consent that said motions* may be made on the day as aforesaid; and further, that said motions shall be submitted on printed briefs, neither party appearing to make oral arguments."

It appears by these stipulations that the parties treated and considered that the motions to be made on October 10, 17 or 24 should be treated as though the application for writ of error had been referred to this court by Mr. Justice Brown. The point was made to Mr. Justice Brown that he had the power to refer the application for writ of error to the full court. But it was thought that the better way perhaps to present the question to this court would be to have the writ issued and then test the question upon the motions as stated. The last stipulation made was the consent on the part of the parties that the motion might be made on October 24th, and that notice of the motion was waived and the same should be submitted on printed briefs. By examination of the motion papers the court will find that the attorney for the Farmers' Company, the plaintiff in error, gave the following receipt, viz.: "Received five copies each of the motion of the defendant in error, The Lake Street Elevated Railroad Company, to dismiss and to affirm, and the brief and argument of the defendant in error, The Lake Street Elevated Railroad Company, upon said motion to dismiss and to affirm. Dated Chicago, September 26th, 1898." The court will notice that this receipt for the copies of the motion and the brief was prior to the stipulation of September 29, 1898, which provided that the motion should be submitted on the printed briefs.

The motion to dismiss and the briefs were filed in this court on October 5, 1898. From that time to the present we have received no request from counsel for the plaintiff in error to print any part of the record of this court, other than that which appears in the briefs so submitted. The matter of printing extracts from the

record on a motion of this character is not by reason of any rule of this court, but is simply for the purpose that the court may pass upon the motion "understandingly." Now, if sufficient appears in the briefs of counsel or in the motion papers that the court may ascertain and determine the points in controversy and pass upon and decide the same, then it would seem to be a useless proceeding to require the parties to submit a lot of printed matter to the court. There was attached to the motion a printed copy of the opinion of the Supreme Court of Illinois, taken from the advance sheets of the report. Since the filing of that printed copy the official report has been issued and published. (173 Ill.) In the opinion of the Supreme Court so submitted on the motion and now so published, every statement of fact is found by the court which is necessary or required by this court to determine the motion now before the court.

In the case of

*Egan* v. *Hart*, 165 U. S., 188,

this court said: "On error, however, to a state court this court cannot re-examine the evidence, and when the facts are found below it is concluded by such finding." And further, in that opinion, the court said: "It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may, for the purpose, not of deciding the facts, but by reason of throwing light on the findings, look into the entire record."

It is not required on a motion of this kind that copies of the published opinion should be printed, but for

the purpose of showing to the court that the statement of facts as they appear in the published volume was not made by the reporter but by the court, we go to the trouble and expense of filing with this reply brief a copy of a certified copy of the opinion of the Supreme Court. Counsel for plaintiff referred to the reported case on page 12 of their brief.

As was said by this court in

*Carey* v. *Railroad Co.*, 150 U. S., 179:

"On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript."

Citing

*Walston* v. *Nevin*, 128 U. S., 578.

And on examination of the briefs for the plaintiff in error and defendants in error and the opinion of the Supreme Court of Illinois, it will be found that every fact necessary to enable this court to act understandingly upon this question appears in those documents.

In the case of *Jeske* v. *Cox*, decided by this court on Monday, October 24, it appears that the practice pursued in that case was that the counsel for plaintiffs in error "served a notice of the parts of the record which he thinks should be considered by this court. All those parts and also the bond are herewith printed as part of the argument so that the court can act understandingly upon the points involved in this motion, as laid down in *Texas* v. *Scott*, 137 U. S., 436."

That would seem to be the more correct practice and especially upon the motion in this case under the circumstances under which the stipulation was made. If counsel

for plaintiff in error had pointed out a single statement of fact in the brief of counsel for defendants in error or the motion that was not fully sustained by the record then they should have served notice upon counsel as to what part of the record they desired printed, to show the error in the statement. This was held to be the correct practice in the case of

*Walston* v. *Nevin*, 128 U. S., 578,

referred to by the court in the Carey case above cited.

n the Walston case a motion was made to dismiss or affirm, and the court said: "A preliminary objection is made that defendants in error should have caused the entire record to be printed, but we only require the printing of so much of the record as will enable us to act understandingly, without referring to the transcript, and *if in the judgment of counsel opposing the motion more in that respect was needed, he might have made such specific reference thereto as would have enabled counsel for the moving party to have supplied it.* As the case stand we have apparently been furnished with quite enough for the disposition of the questions involved."

So in this case and on this motion it would seem that the court has certainly been furnished with "quite enough for the disposition of the questions involved."

That the court will not always require the printing of parts of the record was held in

*Texas Land Co.* v. *Scott*, 137 U. S., 436,

in which the court said: "Such papers should contain in themselves so much of the record as to enable the court to act understandingly, and these are deficient in that regard. We have, however, examined the record and the writ of error is dismissed upon the authority of *R. & D. Railroad Co.* v. *Thouron*, 134 U.S., 45."

There is no dispute that the defendant in error, the Lake Street Company, filed a bill in the Superior Court of Cook County, Illinois, on January 30, 1896, and sworn to on January 29, 1896, and that to this bill the plaintiff in error, the American Trust and Savings Bank and the Northern Trust Company, were made defendants. This statement was made in the brief and in the motion and is not denied, but on the contrary admitted in the brief of counsel for plaintiff in error. It further appears from the statement in the briefs and the motion papers submitted and the opinion of the Supreme Court that the bill was to remove the Farmers' Loan and Trust Company as trustee under a certain mortgage or trust deed. The Supreme Court find in their statement of facts preceding the opinion that "the bill prays that a new trustee may be appointed by the court under the trust deed in place of the Farmers' Company, that injunction be issued enjoining the Farmers' Company from taking any proceeding under the deed of trust, and for such other and different relief as equity may require."

Counsel for the plaintiff in error admit that this bill was filed and that it prays for this relief, but endeavor to make it appear to this court that the object and purpose of the bill was not for the removal of the trustee, but to enjoin the foreclosure proceedings, whereas the *nisi prius* court, the Appellate Court and the Supreme Court of Illinois, each held that the purpose of the bill was to appoint a new trustee in place of the Farmers' Loan and Trust Company for its failure to comply with the laws of the State of Illinois, and that it prayed for an injunction *pendente lite*—that is, pending the proceedings for the appointment of a new trustee—that the hand or the action of the Farmers' Loan and Trust Com-

pany might be stayed under that instrument, not only in respect to the foreclosure, but any action under the trust deed. The many duties and obligations resting upon the trustees under this instrument are stated very fully in the opinion of the Supreme Court and the opinion of the Appellate Court. The Farmers' Company, pending the proceedings for its removal as trustee, was enjoined from acting under these various provisions and conditions of the trust deed as well as in the foreclosure case, and the bill then prayed for general relief.

Notwithstanding three courts have held that the purpose of the bill was the removal of this outlaw, the Farmers' Company, as trustee under the mortgage, counsel still presist in misconstruing and endeavoring to mislead this court as to the purpose and intent of that bill. The prayer of the bill is stated on page 8 of the brief of counsel for the Lake Street Company, but in order that the court may see that we have fairly stated the bill and the prayer thereof in accordance with the record, we print and attach to this reply brief a copy of the bill of complaint, and in addition thereto we call the attention of the court to the fact that counsel for the American Trust and Savings Bank, on pages 10 and 11 of their brief, have printed the bill omitting the formal parts.

Sufficient facts are before the court so that it may understandingly pass upon the question as to whether the state court erred in refusing to permit the case to be removed.

The facts with reference to this petition for removal are fully stated in the brief of counsel for the Lake Street Company, and the statement from the petition is quoted with quotation marks as to the reasons why the Farmers' Company asks that the case be removed. (See pages 8, 9

and 10 of brief.) And following that statement is a copy of the bond printed on pages 10 and 11. Counsel for plaintiff in error have recognized the fact that the printing of the bond in the brief was sufficient to permit them to discuss the question as to whether or not the bond was sufficient and in compliance with the United States statutes. If the printing of the bond in the brief was sufficient to permit them to discuss that question, then certainly the statement in the brief with quotation marks of the grounds set forth in the petition for removal was sufficient. Is it necessary that we should print the entire petition for removal when we print the reasons which are stated in the petition for removal?

The record as to the removability of the cause closes with the bill and the petition for removal. The bond is printed in full and the petition for removal, so far as necessary for this court to determine as to whether or not the cause was removable.

We print herewith a copy of the petition so the court may see that in the brief of counsel for the Lake Street Company, page 9, and in the brief of counsel for the American Trust and Savings Bank, on pages 11 and 12, every part of the petition was printed that was necessary for the court to determine whether on the face of the bill the cause was removable.

Can there be any question under this state of facts that there was sufficient shown in print for this court to act understandingly upon the question as to whether or not the Superior Court erred in refusing to permit the cause to be transferred?

Counsel for plaintiff in error has stated that on the merits of the case they assert that five propositions are presented by the assignment of error (brief, pages 39, 40):

1st. That in the suit there was only a single controversy, and to that controversy the American Trust and Savings Bank and the Northern Trust Company were not indispensable or even necessary parties, and if they were they should not be arranged on the same side of the controversy with the plaintiff in error.

2nd. That there were in fact two or more separable controversies which could be determined without the presence of either of the other two co-defendants.

3rd. That the bill was brought for the purpose of enjoining the further prosecution of a suit in the United States court.

4th. That the decision of the United States court on the motion to remand was an adjudication of the Federal question

5th. That the decree of the state trial court perpetually enjoined the further prosecution of the foreclosure suit pending in the United States court and of which that court had acquired jurisdiction before the filing of the bill in this case.

These five propositions are not before the court. The two first are, but the other three are not, except that we have discussed the last three in connection with the question as to whether they could raise a Federal question by setting forth the foreclosure suit in a petition for removal, and for the purpose of showing that these questions are for the first time raised in the brief of counsel for plaintiff in error, for the convenience of the court we here print the assignment of errors in the State Supreme Court and in this court.

Counsel for plaintiff in error has stated (brief, page 41), with reference to these five propositions, that "it

will be seen that if any one of these five propositions is established it will entitle plaintiff in error to reversal of the case with proper directions to the state court."

The first two propositions which he states are before the court on the printed matter submitted. The third proposition which they state as involved in the record did not involve a Federal question for the reason that even if the purpose of the bill had been to enjoin the further prosecution of the cause in the United States court, it would not involve a Federal question. The fourth proposition which he claims is involved in the record, that the decision of the United States court on motion to remand was adjudication of the Federal question is frivolous on its face. The fifth proposition which he states, that the decree of the state court enjoining the further prosecution of the suit pending in the United States court, is not a debatable question before this court as shown in the briefs heretofore filed on behalf of the Lake Street Company and the American Trust and Savings Bank. Counsel might have raised a multitude of other questions as to admissibility of evidence and then claimed that the court should not pass upon the motion unless the record were printed showing that that evidence was either properly admissible or improperly rejected, and so we might proceed *ad infinitum*. And counsel might claim that various questions were presented by the record that he could not discuss without more of the same being printed, and yet it all revolves back to the one main question and controversy in the case as to whether or not the cause was removable. If the cause was not removable, then this court should not have permitted the writ of error to issue, and the question as to whether the cause was re-

movable is sufficiently presented by the papers submitted to the court, and, if counsel desired to discuss that question, they could have so done upon the papers as submitted and the admitted facts, and especially in view of the fact that this motion should be considered a motion in the nature of an application to the court for a writ of error, as it was so understood when the writ was granted.

So far as the question as to whether the papers submitted upon this motion show that a Federal question was involved or became involved in this litigation by a proceeding prior or subsequent to the filing of the bill, we desire to say that the facts bearing upon this question are stated fully in the briefs and sufficiently to enable this court to understandingly pass upon that question.

It is stated in all the briefs now on file as to the date and the hour of the commencement of the respective suits, the date of the service of the process in the respective suits, and what other fact could it be material for this court to have before it in order to determine the question as to the priority of jurisdiction, if that question could be at all determined under the assignment of errors? *The only Federal question that the assignment of errors properly brings before the court is the one as to whether or not the court erred in permitting the cause to be removed to the United States court.* The other assignment of errors, Nos. 16, 17, 18 and 19, do not, upon this record, present a Federal question for the determination of the court, for two reasons:

1st. Because no such assignment of errors was made in the Supreme Court of Illinois.

2nd. That even if such assignment of errors had been made in that court they do not present a Federal question.

A Federal question does not and cannot arise where the question is simply as to which court has priority of jurisdiction. This we have fully shown by briefs heretofore filed in this cause, and needs no further discussion here except to say that we discussed the question as to whether or not a Federal question was involved in the petition for removal, because they set up in that petition the fact that a suit to foreclose had been filed in the United States court, and as we have shown to the court conclusively, as we think, that a Federal question could not be injected into the case on petition for removal by setting up the foreclosure proceedings; and as the plaintiff in error sought to raise a Federal question by its answer by setting up these foreclosure proceedings and by evidence introduced at the trial, yet this court cannot consider that supposed Federal question for the reason that it was not assigned for error in the Supreme Court of the state, as will be seen by the court by an examination of the assignment of errors herewith printed. There would have been no necessity for printing this assignment of errors made in the Supreme Court of Illinois had it not been that counsel for plaintiff in error have stated in their brief now, for the first time before the court, that they raised a Federal question by reason of their answers filed in the state court and the evidence introduced at the trial; and we therefore present this assignment of errors to show that that question is not before this court, leaving, as heretofore stated, the only Federal question as to whether or not the state court erred in refusing to permit the cause to be removed.

That this court will not pass upon the question as to whether or not a Federal right was denied unless it was specially set up or claimed in the state court has been so

frequently determined by this court as to need the citation of no more than the cases of

*Pim* v. *St. Louis*, 165 U. S., 273.
*Levy* v. *Superior Court*, 167 U. S., 175.
*Oxley Stave Co.* v. *Butler County*, 166 U. S., 648.

In the Oxley Stave Company case the court held that for the reason that the point was not specially set up in the state court this court was without jurisdiction and the writ of error was dismissed.

So that if in this case the only error were as to the Federal question sought to be raised by the answer filed in the state court, then this court under the assignment of errors in the Supreme Court of the state would be without jurisdiction and the writ of error would necessarily have to be dismissed.

In

*Micas* v. *Williams*, 104 U. S., 556,

which was an error to the Circuit Court of the United States and came up on motion to dismiss and to affirm, the court said: "The motion to dismiss is therefore denied, but on looking into the *record* we are entirely satisfied the writ was taken for delay only."

As heretofore stated, the granting of the writ of error to the highest tribunal of a state is not a matter of right but one resting in the sound discretion of the court.

As was said by this court

*In re Kemmler*, 136 U. S., 436,

"A writ of error to the highest court of a state is not allowed as of right, and ought not to be sent out when the court, in session, after hearing, is of opinion that it is apparent upon the face of the *record* that the issue of

the writ could only result in the affirmance of the judgment. *Spies* v. *Illinois*, 123 U. S., 131."

In

*Twitchell* v. *Commonwealth*, 7 Wallace, 321,

this court said that there was no distinction in granting writs of errors to the highest tribunal of the state between civil and criminal cases. And the court said: "The writs of error to state courts have never been allowed as of right."

And in the case of *Spies* v. *Illinois*, 123 U. S., 131, in speaking of allowance of writ of error, the court said: "It is our duty to ascertain not only whether any question reviewable here was made and decided in the court below but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion the writ ought not to be allowed by the court if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument and especially if it is in accordance with our well-considered judgments in similar cases." And in speaking of uniting with the motion to dismiss a motion to affirm, the court said: "The practice has been to grant the motion to affirm when the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

Counsel for plaintiff in error state that there was no color for the motion to dismiss for want of jurisdiction and therefore that the court should withhold its decision until a full hearing of the cause. The cases cited by counsel for plaintiff in error are all cases of writs of error to the Circuit Court of the United States

where the writ of error is a matter of right. A writ of error to the highest tribunal of the state, not being a matter of right but resting in the sound discretion of the court, then if the court is convinced that a mistake was made in granting a writ of error by one of the justices, that mistake should be corrected. The motion to dismiss or a motion to dismiss for want of jurisdiction has been treated by the court as substantially one and the same thing, and this must necessarily be so, because if the court had no jurisdiction then the court *sua sponte* will take notice of that fact and dismiss the writ of error for want of jurisdiction, and if the decision of the highest court of the state was not erroneously decided, then this court has no jurisdiction and a motion to dismiss for want of jurisdiction should be and can be sustained in accordance with the rulings of this court. As we have shown, no Federal question was involved in this case by the answers filed in the state court, or if involved, no error was assigned thereto in the State Supreme Court, therefor leaving for the determination of this court the question as to whether or not the state court erred in refusing to permit this cause to be transferred to the United States court, and if the state court did not erroneously decide that the case was not removable, then this court has no jurisdiction. If it did erroneously decide, then this court has jurisdiction, under section 709, to "reverse, modify or affirm the judgment or decree of such state court and may at their discretion award execution or remand the same to the court from which it was removed by the writ," so that even if the court should determine that the state court erroneously decided, still the court is not bound upon the record to remand it to the state court but may reaffirm as justice may require.

In *Missouri ex rel. Laclede Gas Company* v. *Murphy*, 170 U. S., 78, this court drew distinction between a writ of error to the Circuit Court and to the highest tribunal of the state and said: "It must be remembered that the case does not come before us from the Circuit Court. This is a writ of error to reverse the judgment of the highest tribunal of the state, and this we cannot do unless a Federal questions has been erroneously disposed of."

We believe, therefore that there is no need of any further discussion on the question that there was color for our motion if such is deemed necessary under the facts appearing in this case. And even if there were no color of ground for the motion to dismiss for want of jurisdiction, still the court has the right under the rule to affirm for the reason that it is apparent that the writ of error was sued out for the purpose of delay or that the questions remaining to be decided by the court are frivolous. This court has in a number of cases held that there was no doubt of the jurisdiction of the court, but proceeded and determined that under the record as presented the decree of the court below should be affirmed.

As in the case of

*Chanute City* v. *Trader*, 132 U. S., 210,

the court reviewed the cases that have arisen since the adoption of this rule. And in referring to the case of *Swope* v. *Leffingwell*, 105 U. S., 3, stated that a motion to dismiss was made on the ground that no Federal question was involved, but the court held that it had jurisdiction, and affirmed the judgment on the ground that the case on the merits was governed by previous decisions. And said: "In the present case there does not appear to be any ground for contending that this court has no

jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only." The judgment was affirmed.

In the hanute case the court in quoting from the case of

*Whitney* v. *Cook*, 99 U. S., 607,

said: "Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

So we say in this case that there is absolutely no reasonable cause to retain this cause for review. We believe we have so clearly shown there was no excuse for issuing this writ of error and that the court will not hesitate to either dismiss the writ of error or to affirm the finding of the Supreme Court. It is the only power this court has to make compensation for the loss sustained by the unwarranted delay occasioned in this litigation by the plaintiff in error. The plaintiff in error was entitled possibly to the judgment of the highest tribunal of the state upon the question as to whether it was an outlaw or not under the laws of Illinois; but there is no reason for further contention upon its part on this point. This court may, on motion to dismiss for want of jurisdiction, affirm, although it is clear the court had jurisdiction.

In

*Richardson* v. *Railroad Company*, 169 U. S., 128,

the court cites the case of *Chanute* v. *Trader*, and after holding that the court had jurisdiction, in speaking of the findings of the State Supreme Court said: "That rul-

ing was so absolutely correct that we do not feel constrained to retain the case for further argument."

In

*Arrowsmith* v. *Harmoning*, 118 U. S., 194,

error to the Supreme Court of the State of Ohio, a motion was made to dismiss united with a motion to affirm. The court said: "The decision, however, necessarily involves a denial of the right which was claimed in this way and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied, but the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

In

*Church* v. *Kelsey*, 121 U. S., 282,

a motion was made to dismiss and to affirm. The court said in speaking of the motion to dismiss on the ground that the court had no jurisdiction: "That is sufficient to give us jurisdiction, but the decision was so clearly right that it is unnecessary to keep the case here for further argument." The motion to dismiss was overruled but to affirm was granted.

Counsel for plaintiff in error have sought to inject into this case the fact that a law was passed by the State of Illinois amending the "trust act" after the decree was rendered in this cause, after the decision of the Appellate Court affirming that decree and after the cause was submitted to the Supreme Court of Illinois and by that court taken under advisement. There is not a syllable or a word in this record that the attention of the Supreme Court of Illinois was ever brought to the fact that the act in question had been passed. It may be stated, however,

that the counsel for plaintiff in error did endeavor to have the Supreme Court set aside the order taking the cause under advisement and submitted to that court the question as to what effect, if any, this amendment to the trust act had upon the decree entered in this cause. This the Supreme Court declined to do, although an elaborate brief was filed on the subject by the counsel for the plaintiff in error. We only state this for the purpose of showing that the Supreme Court of Illinois did not consider that that act affected the decree passed in this case, and we call the attention of the court to the fact that both the Supreme Court and the Appellate Court held that the act which was construed by the Supreme Court in that case did not apply to a mortgage or trust deed which was a mere security for a debt, and said: "The trust instrument, however, in the present case imposes trust duties of an active character. This will readily appear by reference to the trust deed executed to the trust companies, the appellant and the American Trust and Savings Bank." The amendment to the act does nothing more than what the Supreme Court and the Appellate Court both held, viz., that it would be competent for the plaintiff in error to accept of the trusteeship where it did not provide for any active duties under the law as determined by the Supreme Court of Illinois. The decree having been entered in this cause before the act in question was passed, the act can have no effect whatever upon the decree. This court has held that it will not review a question not presented to the Supreme Court of the state. The question as to the effect of this state law was not called to the attention of the Supreme Court so far as the records show by petition for rehearing or otherwise. It was gratuitous upon the part of counsel for plaintiff in error to call the attention

of the court to this at all or print it as a part of their brief. What the purpose of counsel in so doing was we cannot conceive, because they certainly must understand that there is no power in the court on this record to pass upon that question.

That the passage of this act after the entering of the decree would not affect the same merely because the appeal was pending, see

*Moore* v. *Williams*, 132 Ill., 589.

Counsel for plaintiff in error have not stated or pretended to show that this question is anywhere involved in this record, and we consider it wholly unnecessary to discuss it.

On the question as to the sufficiency of the bond presented to the state court for removal, counsel for plaintiff in error only cite two cases and a quotation from Dillon, Foster and Desty. Foster and Desty, in the quotations shown, both state that the bond is sufficient if it have "a *principal* and sufficient surety."

The case of *Stevens* v. *Richardson*, 9 Fed. Rep., 191, cited by counsel, was where Mr. Justice Blatchford denied the motion to remand because a good and sufficient bond was presented to the court as a substitute for one attacked in that case. Judge Blatchford, in this case, after discussing the queston of sufficiency of the bond, said: "Aside from this a new bond running in the name of and executed by Stevens and Richardson as *principals* and the former sureties as sureties was filed in the state court on the 28th day of September, 1881," and thereupon the objection to the bond was overruled.

As to the case decided by Judge Drummond, we have

to say this case is not in accordance with the decisions of the Supreme Court of Illinois, not only on the particular question involved in this case, but also in similar questions as shown by our former brief, as where a party plaintiff was permitted to take appeal upon his filing a bond, the Supreme Court held that the plaintiff was the one who should sign and who should take the appeal, and that a stranger to the record could not. We have called the attention of the court in our former brief to the difference between the present and the former act, that the former act only required good and sufficient surety, while the present act required that the party "shall make and file a bond with good and sufficient surety." There must have been some reason for this change in the law, and we have found by correspondence with the various clerks of the United States courts in the different circuits that it is the uniform practice in all these removable cases, that the bond is signed by the petitioner; showing that it is the current opinion of the bar that under this present act the bond should be signed by the petitioner. It need not necessarily be signed by the petitioner in person, if it be signed by his attorney in fact, and we presume a bond signed by the petitioner by his counsel or his attorney would be considered as sufficient if he had authority to so make and file the bond. Counsel for plaintiff in error state that no objections were made to this bond. (See pp. 11 and 12 of our former brief.) To answer this point made by counsel for plaintiff in error, we print herewith formal written objections filed to the bond, but the formal order denying the motion of removal shows of itself that there were objections to the bond.

In regard to the supersedeas and the excuse apparently made by plaintiff in error in their brief as to why applica-

tion was not made within the time required, viz.: that the record was so voluminious that they did not have time to prepare it, we only have this to say: That the record, or rather the certificate of evidence, which is the main part of the record, was filed in the state court and copies thereof made by counsel for plaintiff in error, one copy of which was furnished to counsel for the Lake Street Company, and copy was retained by counsel for plaintiff in error, having identical pages. Thereupon a stipulation was made under the law of the State of Illinois that the original certificate of evidence might be certified to the Appellate Court and to the Supreme Court of Illlnois instead of a copy thereof. The copy retained by counsel for plaintiff in error is the one now on file in this court, which the clerk of the Supreme Court of Illinois certified to as a copy of that upon file in this court. So that the record made and certified by the clerk of the Supreme Court consisted of but a few pages, viz.: of that part of the proceedings in that court. An examination of the record will show that it was all typewritten matter with the exception of the amended bill of complaint of foreclosure filed in the United States court, which is printed, copy of the opinion of the Supreme Court from pages 1102 to 1116, which is printed, and printed copy of the mortgage which is shown on page 16 of the record. The decree of the Superior Court removing The Farmers' Loan and Trust Company as trustee is a printed document at page 105. The certificate of evidence begins at page 149 and runs to page 1043, and is all typewritten, so as a matter of fact while the record consists of over 1 000 pages, yet it is all in good form and is easily read and the various documents are easily found either printed into the record or typewritten, and is not like many of the records sent

to this court where they are made in long hand and hard to ascertain from the record the different points involved in the controversy.

We would also call the attention of the court to the further fact that the writ was allowed in this case by Mr. Justice Brown on July 7th, issued by the clerk of the court on July 9th, but the record was not filed until August 10th, which was more than thirty days after the issuing of the writ. The clerk of the Supreme Court did not, nor was he called upon, to certify to the record until August 2, 1898, as far as it appears. We have not made any point upon the fact that the record was not filed in time, as we desire to have this matter determined and settled upon the motion which we have made.

It is therefore respectfully submitted that for the reasons stated in former briefs filed in this cause and in this brief that the motion to dismiss the writ of error should be sustained, or in case the court is of opinion that that motion cannot be sustained that the judgment of the Supreme Court of Illinois should be affirmed, for the reason that it is apparent that this appeal was and could only have been taken for the purpose of delay. This purpose is clearly manifested by the brief filed on behalf of the plaintiff in error. Every fact necessary for this court to "understandingly" pass upon the motion is before this court. Counsel for plaintiff in error have sought to obtain delay by making suggestions to the court that there has not been sufficient statement of facts printed to enable *them* to discuss the questions before the court. It is not a question that the counsel had a right to raise, but it is a question for this court to raise as to whether or not it can understandingly pass upon the questions upon the facts before it and, as we show by the author-

ities, this court will and can and has the power to examine into the *record* itself to determine whether or not it has or has not jurisdiction of the question. If counsel for plaintiff in error had desired to discuss the questions presented, they could have done as counsel did in *Jeske* v. *Coe*—served notice as to what part of the record they wished printed other than that shown in the statement of facts in the motion and in the briefs. They did not see fit to do this, but rather waited until the last moment, thinking that this court would take the motion when it would be too late to file a reply brief, and then file their brief on the supposition that although it was shown to the court that it did not have jurisdiction, yet the court would hold this case for a period of a year or more, and then finally determine that there was no jurisdiction. In the meantime they would endeavor to get the United States court to assert jurisdiction in the foreclosure case and disregard again the injunction pending in this case, which the appeal does not stay. Of course, such a proceeding would lead to a conflict between the two courts.

Such result can easily be foreseen in this cause. The plaintiff in error has not only violated the law of Illinois with contempt, but has violated the injunction in this cause.

There is no good reason shown by plaintiff in error why this court should hold this cause for a final hearing. If the court should deem it necessary for a proper understanding of this case that any part of the record not now in print should be printed, we are willing to print the same, but we think no such ruling should be made, as the facts, so far as necessary for this court to settle this motion, are either printed or stated by counsel for the respective parties.

Or in other words the *facts* are not disputed so far as necessary to determine the questions now before the court. We have shown that the plaintiff in error cannot confer jurisdiction on this court by now for the first time assigning error that was *not* assigned in the Supreme Court of the State of Illinois. We print the assignment of errors in that court and in this court for the purpose of showing that the other Federal questions now claimed to be involved were not presented to the Supreme Court of Illinois, and that the only Federal question raised in that court was as to whether the court erred in refusing to permit the cause to be removed. As the Supreme Court of Illinois did not erroneously decide the Federal question presented to that court then this court is necessarily without jurisdiction and the writ of error should be dismisssd.

We wish to state in conclusion, which will be verified by the clerk, that we were not furnished with a copy of brief of counsel for plaintiff in error until noon of Monday, October 24, 1898, and that the briefs were not delivered to the clerk until the hour for convening the court had arrived.

Respectfully submitted.

CLARENCE A. KNIGHT,
*Attorney for the Defendant in Error, The Lake Street Elevated Railroad Company.*

IN THE

# Supreme Court of the United States.

The Farmers' Loan and Trust Company,
*Plaintiff in Error,*
*vs.*
The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company.
*Defendants in Error.*

Error to Supreme Court, of Illinois.

COPY OF BILL OF COMPLAINT IN SUPERIOR COURT OF COOK COUNTY, VERIFYING STATEMENT IN REPLY BRIEF THAT A TRUE COPY, OMITTING FORMAL PARTS, WAS PRINTED IN BRIEF OF AMERICAN TRUST AND SAVINGS BANK AT PAGES 10 AND 11.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE SUPERIOR COURT OF COOK COUNTY—OF THE JANUARY TERM, A. D. 1896.

The Lake Street Elevated Railroad Company, complainant,
*vs.*
The Farmers' Loan and Trust Company *et al.*, defendants.

*In Chancery.*
*Gen. No. 172,156.*

*To the Honorable Judges of the Superior Court of said Cook County, in Chancery sitting:*

Humbly complaining, your orator, The Lake Street Elevated Railroad Company, a corporation duly organ-

ized and existing under the laws of the State of Illinois, respectfully shows unto your Honors that it is a corporation duly incorporated and existing under and by virtue of an act of the legislature of the State of Illinois, providing for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same, and for prescribing and defining the duties and limiting the powers of such corporations when so organized, approved and in force March 1, 1872, as by the articles of incorporation of your orator ready to be produced in court will more fully and at large appear; that your orator was organized as such corporation in the month of August, 1892, with a capital stock of five million dollars, divided into fifty thousand shares of one hundred dollars each, and that in the month of April, 1893, the capital stock of your orator was by due process of law increased to ten million dollars, and consisted of one hundred thousand shares of the par value of one hundred dollars each.

Your orator further shows unto your Honors that on the 7th day of April, 1893, your orator made, executed and afterwards delivered a certain mortgage or trust deed to the American Trust and Savings Bank, a corporation duly organized and existing under the laws of the State of Illinois, as trustee, party of the second part, and The Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, as co-trustee, party of the third part, said parties of the second and third parts being designated in said mortgage or deed of trust as trustees, a copy of which said mortgage or deed of trust is hereto attached and marked "Exhibit A" and made a part hereof.

Your orator further shows unto your Honors that after

your orator made said mortgage as aforesaid, the same was signed and accepted by said American Trust and Savings Bank and the trust therein, on the 3rd day of May, 1893, and that the same was signed, executed and acknowledged, and said The Farmers' Loan and Trust Company accepting the trust therein on the 5th day of May, 1893, and that said mortgage was afterwards filed for record in the recorder's office of Cook County, Illinois, on May 6th, 1893, and there recorded in book 4,256 of records, at page 230, and was afterwards filed for record in the office of the secretary of state of Illinois on May 11th, 1893, and there recorded in book 12, at page 266.

Your orator further shows unto your Honors that at the time said mortgage was so made, executed and delivered and recorded, said The Farmers' Loan and Trust Company, being such corporation under the laws of the State of New York, had not, nor prior thereto, nor has it since, complied with the laws of the State of Illinois, requiring the deposit with the auditor of public accounts, for the benefit of the creditors of said company, of the sum of two hundred thousand dollars in stocks of the United States or municipal bonds of this state, or in mortgages on improved and productive real estate of this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon.

Your orator further shows unto your Honors that at the time of the execution and delivery and acceptance of said trust under said mortgage, your orator did not know that said The Farmers' Loan and Trust Company had not complied with the laws of the State of Illinois as to such deposit as aforesaid.

Your orator further shows unto your Honors that since

the acceptance of said trust by said The Farmers' Loan and Trust Company it has been doing business in the State of Illinois and in the City of Chicago, County of Cook aforesaid, without having made the deposit as required by the laws of the State of Illinois.

Your orator further shows unto your Honors that under and by virtue of said mortgage or deed of trust, said The Farmers' Loan and Trust Company, as aforesaid, has appointed one William Burry as its agent, to represent the said The Farmers' Loan and Trust Company as its agent, to enforce the compliance on the part of your orator with the trusts reposed in it, the said The Farmers' Loan and Trust Company, under said mortgage or deed of trust; that said Burry as such agent, for and on behalf of said The Farmers' Loan and Trust Company, has acted and is still acting in the State of Illinois as its said agent, and doing business therein under and by virtue of the authority claimed to be vested in said The Farmers' Loan and Trust Company under said mortgage or deed of trust.

Your orator further shows unto your Honors that under and by virtue of said mortgage there was certified to and delivered by said The Farmers' Loan and Trust Company and the American Trust and Savings Bank, trustees under the said mortgage, six thousand five hundred (6,500) bonds of one thousand dollars each, provided to be issued by said mortgage.

Your orator further shows unto your Honors that after the said trust companies had certified to said sixty-five hundred bonds, additional bonds were issued under said mortgage or deed of trust, under the provisions thereof providing for the issuing of bonds over and above said 6,500 bonds; that said additional issue of bonds so

provided for were certified to by said The Farmers' Loan and Trust Company and delivered to your orator and disposed of by your orator under the direction of said William Burry as agent for said The Farmers' Loan and Trust Company, as provided under the terms and provisions of said mortgage.

Your orator further shows unto your Honors that since the acceptance of said trust by said The Farmers' Loan and Trust Company, the said company has transacted and done business through its said agent, William Burry, in connection with the trusts therein provided and accepted by it, and is still claiming the right and authority to do business by the execution and carrying out of the trusts assumed by it under the provisions of said trust deed or mortgage.

Your orator further shows unto your Honors that since the making and execution of said mortgage or deed of trust your orator has built and is now operating a railroad, beginning at Market and Madison streets, in the south division of the City of Chicago, thence along and upon Market street to Lake street, and thence west upon Lake street to West 52nd street, and from Market street eastwardly on East Lake street, or Lake street, to Wabash avenue; that said railroad so operated by your orator is operated exclusively for the transportation of passengers within the City of Chicago and over the route as aforesaid, and that the said railroad so operated is supported by rows of iron posts or columns, longitudinal and cross-girders, and with railroad ties resting on such girders and upon such ties tracks are laid over which the trains are operated, all being what is commonly known as an elevated railroad.

Your orator further shows unto your Honors that it

has been unable to earn sufficient money in operating its said railroad as aforesaid to pay the interest upon the bonded indebtedness secured by said mortgage or deed of trust, as aforesaid, but that notwithstanding such fact one William Ziegler, of New York City, conspiring and confederating with various persons, and altogether representing 610 bonds of the total issue of 7,574 bonds, as aforesaid, made a demand upon said The Farmers' Loan and Trust Company and said The American Trust and Savings Bank, that they proceed to foreclose said mortgage and take possession thereof under and by virtue of the powers contained in said mortgage and the authority vested in said trustee, or to file a bill to foreclose such mortgage:

Your orator further shows unto your Honors that your orator filed a bill in the Circuit Court of Cook County, Illinois, against said William Ziegler and others, enjoining them, and each of them, and said The Farmers' Loan and Trust Company and the American Trust and Savings Bank from taking any action or proceeding to foreclose said mortgage under the request or demand made by said William Ziegler and others, representing 605 of said 610 bonds.

Your orator further shows unto your Honors that it was informed by said William Burry, as agent for said The Farmers' Loan and Trust Company, and representing it as its counsel and attorney, on the 27th day of January, 1896, that no other demand for action had been made upon said The Farmers' Loan and Trust Company than that made by said William Ziegler, as aforesaid, but that notwithstanding that no other person was asking or demanding of said The Farmers' Loan and Trust Company any action or proceeding on behalf of the other bond-

holders than said 610 bonds, that it proposed to and would file a bill to foreclose the said mortgage for failure to pay the interest upon bonded indebtedness aforesaid.

Your orator further shows unto your Honors that the interest upon all of its bonded indebtedness issued as aforesaid was paid up to the 1st day of January, 1895; that your orator was enabled to obtain an advancement or loan of sufficient money to pay the interest falling due upon January 1, 1895, to each party who would turn over the coupons as security for such advancement; that said January, 1895, interest has been paid by said Lake Street Company, with the exception of about———————— thousand dollars.

Your orator further shows unto your Honors that notwithstanding the parties, persons, firms or corporations holding or representing the coupons upon the bonds due on July 1, 1895, and January 1, 1896, have made no demand or request upon said The Farmers' Loan and Trust Company, to take any action or proceeding as aforesaid, other than said 610 bonds, yet said The Farmers' Loan and Trust Company, in violation of its duty, and for the purpose of injuring and destroying the property and assets of your orator, intends to and will, unless restrained by this honorable court, proceed to take possession of or attempt to foreclose said mortgage or trust deed as aforesaid.

Your orator further shows unto your Honors that the holder of 6,574 bonds, issued by your orator under said mortgage, especially requested said The American Trust and Savings Bank and said The Farmers' Loan and Trust company to take no action whatsoever under said mortgage or trust deed, with reference to the failure of said company to provide for or pay the interest upon the coupons due July 1, 1895, and January 1, 1896. And

your orator further states that said The American Trust and Savings Bank, in compliance with such request, and after a full examination of the affairs of said company, did, on the 28th day of January, 1896, decline and refuse to join with said The Farmers' Loan and Trust Company in any proceedings whatsoever to enforce the provisions or conditions of said mortgage on account of the failure of your orator to pay the said interest as aforesaid.

Your orator further shows unto your Honors that it is the desire and wish of the holders of over 6,500 of the bonds of your orator issued under and by virtue of said trust deed as aforesaid that said The Farmers' Loan and Trust Company should be removed from its position as trustee under said mortgage. First, for failure to comply with the laws of the State of Illinois; and, second, for assuming to act or take proceedings under said mortgage contrary to and in violation of the request of the holders of a majority of the bonds issued under said mortgage or deed of trust.

Forasmuch, therefore, as your orator is remediless in the premises except in a court of equity, where matters of this kind are properly cognizable and relievable, your orator files its bill of complaint, and makes The Farmers' Loan and Trust Company, the American Trust and Savings Bank, and the Northern Trust Company, the holder of over 6,500 bonds issued under said mortgage and a corporation under the laws of the State of Illinois, doing business in the City of Chicago, Cook County, Illinois, and all other holders of bonds issued by The Lake Street Elevated Railroad Company under said mortgage or deed of trust, as aforesaid, parties defendant to this its bill of complaint, and prays:

First. That a new trustee may be appointed by the

court to act under and by virtue of said mortgage or deed of trust attached hereto as "Exhibit A," in place and instead of said The Farmers' Loan and Trust Company.

Second. That an injunction *pendente lite* may be issued restraining and enjoining said The Farmers' Loan and Trust Company from taking any proceedings or bringing or prosecuting any suit or suits, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, and that upon the final hearing hereof said injunction may be made perpetual.

Third. That your orator may have such other and further and different relief in the premises as equity may require and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of summons in chancery, directed to said The Farmers' Loan and Trust Company, the American Trust and Savings Bank, and the Northern Trust Company, commanding them and each of them to appear before this honorable court on the first day of the next term thereof, to be held at the court house, in the County of Cook aforesaid, then and there to answer this bill, etc.

And may it please your Honors to grant unto your orator the people's writ of injunction immediately and without notice, to be directed to said The Farmers' Loan and Trust Company, its agents, attorneys, solicitors and servants, restraining it and them, and each of them, as hereinbefore prayed.

And your orator will ever pray, etc.

THE LAKE STREET ELEVATED RAILROAD COMPANY,

By D. H. LOUDERBACK,

*President.*

KNIGHT & BROWN,

*Solicitors and of Counsel for Complainant.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE SUPERIOR COURT OF COOK COUNTY.

The Lake Street Elevated Railroad Company,
*Complainant,*
*vs.*
The Farmers' Loan and Trust Company *et al*,
*Defendants.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

D. H. Louderback, being first duly sworn, deposes and says that he is president of the above named complainant in the above entitled cause, The Lake Street Elevated Railroad Company.

Affiant further states that he has read the attached and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated to be upon information and belief, and as to such matters he believes it to be true.

Affiant further says that by reason of the matters and things set forth in said bill of complaint, he states that the rights of the complainant will be unduly prejudiced if the injunction prayed in said bill of complaint be not issued immediately and without notice to the defendants.

Affiant further states that if said injunction is not issued immediately and without notice that said The Farmers' Loan and Trust Company without the concurrence and co-operation of said The American Trust and Savings

Bank, will file a bill to foreclose said mortgage or trust deed referred to in said bill of complaint, and that by so doing it will disorganize and injure the said The Lake Street Elevated Railroad Company in its rights and property, to a great and irretrievable extent; that said The Farmers' Loan and Trust Company has no property or assets of any name, nature or kind whatsoever, within the State of Illinois which can be reached by execution or process of law, to satisfy any claim for damages which said The Lake Street Elevated Railroad Company might recover against said The Farmers' Loan and Trust Company for illegally filing such bill to foreclose said mortgage without authority or right whatsoever.

Wherefore, and for the reasons set forth in said bill, this affiant states that the rights of the complainant in this cause will be unduly prejudiced, unless the injunction as prayed for is now issued immediately and without notice to the defendant, The Farmers' Loan and Trust Company.

D. H. LOUDERBACK.

Subscribed and sworn to before me this 29th day of January, A. D. 1896.

[NOTARIAL SEAL.] FRANK J. GATRELL,
*Notary Public.*

Filed January 30, 1896.

EXHIBIT "A."

## MORTGAGE.

THIS INDENTURE, made this seventh day of April, in the year of our Lord one thousand eight hundred and ninety-three (A. D. 1893), between The Lake Street Elevated Railroad Company, a corporation duly organized and existing under the laws of the State of Illinois, hereinafter called the "Railroad Company," party of the first part, and The American Trust and Savings Bank, a corporation duly organized and existing under the laws of the State of Illinois, as trustee, party of the second part, and The Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, as "co-trustee," party of the third part, said parties of the second and third parts being hereinafter, for convenience, called the "trustees."

WHEREAS, the Railroad Company is a corporation duly organized and existing under the laws of the State of Illinois, for the purpose of constructing, maintaining and operating a railroad from a point at or near the east end of Lake street, in the City of Chicago, County of Cook and State of Illinois, in a westerly direction upon or near said Lake street, and the extensions thereof, to the west line of said Cook County, together with such feeders, loops, switches and branch lines from such point or points in said Cook County as the Board of Directors of said Company may deem advisable; and

WHEREAS, The Railroad Company is engaged in the construction of a part of its main line of railroad lying within the said City of Chicago, and has acquired the right to construct, maintain and operate its railroad upon, along and across various streets and alleys, by virtue of various ordinances duly passed by the City Council of the said City of Chicago, and said Railroad Company is about to apply for and obtain permission of said City of

Chicago to construct, maintain and operate branch lines of railroad leading from said main line of railroad; and,

WHEREAS, There is now existing against the Railroad Company a bonded indebtedness covered by a mortgage or deed of trust upon all its railroads and appurtenances and its property, real and personal, and the Railroad Company has contracted for the construction and equipment of all that part of its elevated railroad over the route which it has hitherto been authorized by ordinances as aforesaid, to construct, maintain and operate; and

WHEREAS, it is now necessary for the Railroad Company to issue its bonds and borrow money for the purpose of redeeming and cancelling said bonded indebtedness and for the purpose of constructing, completing, finishing, improving, operating and equipping its main line of railroad and appurtenances thereto, and also from time to time for the following purposes, viz.:

(*a*) In adding to, extending and building additional railroad and branches of said railroad, and acquiring railroads by construction or otherwise at not exceeding eight hundred and fifty thousand dollars ($850,000) of bonds per mile for two track road fully equipped with rolling stock, stations, switches, signal-stations and necessary appurtenances.

(*b*) Paying, adjusting or selling claims or suits for damages arising out of the building or operation of said railroad or extensions or branches.

(*c*) Procuring right of way and such other real estate as may be needed by the Railroad Company in extending, adding to and building branches of said railroad.

(*d*) Paying any interest that may accrue and remain unpaid during the first two years of the operation of the railroad, provided to be constructed in said construction contract after delivery and acceptance of said railroad

from the contractors for the same after applying to the payment of such interest the net earnings of the railroad during the said two years.

(e) In case the railroad shall eventually cross the Chicago river, or either of its branches, upon its own bridge, not exceeding five hundred thousand dollars ($500,000) of bonds for each such bridge and its approaches.

And Whereas, the Board of Directors of the Railroad Company with the concurrence of more than two-thirds of the amount of all the stock of the Railroad Company which has been duly expressed and recorded as required by law, has resolved to borrow money for said purposes, and issue and dispose of its mortgage bonds therefor, and secure the payment of these bonds so to be issued, with the interest thereon, by a first mortgage upon its corporate property and franchises, which shall be a first lien thereon and upon all the real and personal property, rights and franchises relating thereto, now owned and held by the said Railroad Company, or which may hereafter be owned by it.

And, Whereas, the Board of Directors of the Railroad Company has further resolved, with the like concurrence as aforesaid, that the said bonds shall be executed and issued by the President and Secretary of the Railroad Company under its corporate seal, and the interest warrants all authenticated by and with the name of the Treasurer, that the said bonds shall be numbered consecutively from one upwards, each for the principal sum of One Thousand Dollars ($1,000.00) payable in gold coin of the United States of America of the present standard of weight and fineness, to the bearer or to the registered holder thereof, at the office of the American Trust and Savings Bank, in the City of Chicago, or at the office of the Farmers' Loan and Trust Company, in the City of New York, on the first day of July, A. D. 1928, with interest thereon at the rate of five per cent. per annum, payable in like coin semi-annually on the first days of January and July in each year, from January first, 1893, until said

principal sum shall be fully paid, upon the presentation and surrender of the coupons annexed to said bonds to evidence the said interest thereon, at the office in the said American Trust and Savings Bank or at the office of the said Farmers' Loan and Trust Company, the said bonds each to contain the condition, set forth in the form below, and each of said bonds and coupons attached thereto and the trustees' certificate to be endorsed thereon to be substantially in the following form:

No. — $1,000.00

UNITED STATES OF AMERICA.

STATE OF ILLINOIS.

THE LAKE STREET ELEVATED RAILROAD COMPANY.

First Mortgage, Five Per Cent. Thirty-five Year Gold Bond

FOR VALUE RECEIVED, The Lake Street Elevated Railroad Company, a corporation created and existing under the laws of the State of Illinois, promises to pay to bearer (or if this bond be registered, to the registered holder thereof) at The American Trust and Savings Bank, in the City of Chicago, in the State of Illinois, or at the Farmers' Loan and Trust Company, in the City of New York, in the State of New York, on the first day of July in the year of our Lord one thousand nine hundred and twenty-eight (A. D. 1928), the sum of one thousand dollars ($1,000.00) in gold coin of the United States of America of the present standard of weight and fineness, and to pay interest thereon in like gold coin at the rate of five per centum per annum from January 1st, A. D. 1893, upon the presentation and surrender at said American Trust and Savings Bank or at the Farmers' Loan and Trust Company of the annexed coupons as they severally become due, semi-annually on the first days of January and July of each year until said principal sum shall be fully paid.

Both principal and interest are payable without deduction on account of any taxes or assessments, by whatsoever authority the same may be levied.

This bond is one of a series of bonds of like tenor, date, amount and effect, numbered consecutively from one upwards, all of which, whether issued or to be issued, together with the interest thereon, without reference to the time when said bonds shall be actually issued, are equally secured by a mortgage or deed of trust, bearing even date herewith, made by said Railroad Company to said American Trust and Savings Bank of Chicago, Illinois, as trustee, and the Farmers' Loan and Trust Company of New York City, as co-trustee, conveying all and singular its railroad and appurtenances, its real and personal property, rights of property and franchises now owned or which may be hereafter acquired by said Railroad Company, as more particularly mentioned and described in said mortgage or deed of trust. Said bonds issued and to be issued by said Railroad Company, its successors and assigns, are issued subject to and in accordance with the terms and conditions of said mortgage or deed of trust; the amount of bonds to be issued is limited as provided in and by said mortgage or deed of trust.

Upon default in the payment of any interest on any of said bonds the principal of said bonds may be made due and payable as provided in said mortgage or deed of trust.

It is agreed by the holder of this bond that no recourse shall be had for the payment of this bond, or the indebtedness evidenced thereby, or the interest thereon, or any part thereof to the individual liability of any stockholder or officer of the said Railroad Company, such liability being waived, and by accepting this bond each successive holder assents to this provision.

This bond may be registered on the books of said Railroad Company at its financial agency in Chicago or in New York, and such registration noted thereon, after which no transfer thereof shall be valid except on said books, until after registered transfer to bearer. The annexed coupons shall always be transferable by delivery.

This bond shall not be obligatory and valid until the

certificate endorsed hereon has been signed by said trustee and co-trustee under said mortgage or deed of trust, or their successors.

In Witness Whereof, the said The Lake Street Elevated Railroad Company has caused its corporate seal to be hereto affixed, and the same to be attested by its secretary, and this bond to be signed by its president, and has attached hereto coupons authenticated by the facsimile of the signature of its treasurer, this seventh day of April, one thousand eight hundred and ninety-three (A. D. 1893).

The Lake Street Elevated Railroad Company,
By *President.*
Attest:

*Secretary.*

(Coupon.)

On the first day of ———— A. D.
The Lake Street Elevated Railroad Company will pay to the bearer, at The American Trust and Savings Bank, in the City or Chicago, or at The Farmers' Loan and Trust Company in the City of New York, Twenty-five Dollars ($25.00) in United States gold coin, for six months' interest on its first mortgage bond No. ————, without deduction for taxes as in said bond expressed.

*Treasurer.*

(Trustee's Certificate.)

This bond is hereby certified to be one of the series of bonds described in the within mentioned mortgage or deed of trust.

The American Trust and Savings Bank, *Trustee.*
By

*President.*

The Farmers' Loan and Trust Company, *Co-Trustee,*
By

*President.*

And, Whereas, the Board of Directors of the Railroad Company [illegible] the concurrence of more than two-thirds of its stockholders aforesaid, has resolved to secure the payment of the said bonds so to be issued with the interest thereon, according to the tenor and effect of said bonds and coupons, by the execution of this mortgage or deed of trust;

Now, Therefore, This Indenture Witnesseth, That to secure the payment of the said bonds and all moneys payable thereunder to the amount issued or to be issued as hereinafter mentioned, and in consideration of the premises, and of One Dollar lawful money of the United States of America to the Railroad Company by the trustees, at or before the ensealing or delivery of these presents, in hand paid, the receipt whereof is hereby acknowledged, the Railroad Company hath granted, bargained, sold, remised, released, aliened, enfeoffed, conveyed, confirmed, assigned, transferred and set-over, and by these presents, doth grant, bargain, sell, remise, release, alien, enfeoff, convey, confirm, assign, transfer and set-over unto the said parties of the second part and their successors and assigns forever, all and singular all the right, title, interest, claim or demand whatsoever, which the railroad now has or is entitled to, or which it shall or may at any time hereafter acquire or become entitled of, in or to, all and singular the railroad and railroads of the party of the first part constructed or now being or hereafter to be, constructed. The said road now being constructed being about seven and one-half miles, or thereabouts, in length, in all its branches from its main lines, and extending from Market street, in the City of Chicago, in the County of Cook and State of Illinois, along Lake street to West Fifty-second street in said city, with a loop beginning and ending at said Market street. Also any and all branches and extensions thereof, which are or may hereafter be constructed, or acquired, or authorized to be constructed or acquired. Also all the lands, tenements, and hereditaments acquired or appropriated, or which may hereafter be acquired or appropriated for the purpose of a right of way or for other purposes, for said railroad or railroads, and all the easements or appurtances thereto

belonging, or in any wise appertaining, and all railroads, sidings, turnouts, ways, and rights of way, depot grounds, tracks, rails, bridges, viaducts, culverts, fences, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, warehouses, machine-shops, workshops, superstructures, erections and fixtures and other structure, with the improvements thereon, whether now held or hereafter at any time acquired for the use of said railroad or railroads or branches thereof, or in connection therewith or the business thereof; and with all the piers, foundations, columns, girders, trestles, sleepers, rails, telegraph, telephone and signal devices and other members and appliances of or connected with said railroad or belonging thereto, or used or provided, or intended to be used for the same, and all the engines, boilers, cables, locomotives, motors, tenders, passenger-cars, freight-cars and other cars, rolling stock and equipments of or appertaining to, or used in connection with the said railroad, whether now owned or hereafter acquired by said railroad company, and all tools, machinery, apparatus, fuel, materials and supplies whatever, whether for or in connection with such railroad itself or the motor power, rolling-stock or equipment thereof, or for workshops, machine shops or other buildings, or construction or repairs of any kind now or hereafter belonging to or provided for, or intended to be used for or in connection with said railroad, or for the construction, operation or maintenance thereof. Also all and singular the franchise, licenses, permits and privileges, permits and privileges from any governmental or municipal authority, and all powers, benefits, rights, immunities, income, tolls, fares, profits and advantages belonging to the Railroad Company, appertaining to or to arise or to accrue from the said railroad and the maintenance and operation thereof, whether the same are now owned or possessed, or shall be hereafter acquired by the said Railroad Company, including all the franchises, power, rights and privileges pertaining to said railroad, conferred upon said Railroad Company in and by any ordinances which it now has from the City of Chicago, or which may be hereafter conferred upon it in any manner soever; together with all and singular the tenements, heredita-

ments and appurtenances to the said Railroad Company, and other property and premises hereby mortgaged or expressed, or intended so to be, or any part thereof, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity of the Railroad Company of, in and to the same, and every part and parcel thereof, with the appurtenances as fully and completely as if the said railroad were at the date hereof fully constructed, completed and equipped.

To Have and to Hold, all and singular the above described premises, property, rights, franchises and appurtenances unto the said parties of the second part, their successors and assigns forever, to the only proper use and behoof of the parties of the second part, their successors and assigns, *in trust nevertheless*, for the equal *pro rata use*, benefit and security of each and all and every the persons or corporations who may be or become holders of any of the above-mentioned bonds, numbered from one to the highest number that may be issued, inclusive, without any preference or priority of any one bond over another by reason of priority in the time of issue or negotiation thereof or otherwise howsoever, and for the uses and purposes herein declared and expressed.

Provided however, and these presents are upon the express condition that if the Railroad Company, its successors or assigns, shall well and truly pay or cause to be paid to the holders thereof, the principal of all the bonds secured or intended so to be, and the interest moneys to become due thereon respectively at the time and in the manner specified in the said bonds and coupons, without deduction on account of taxes, or assessments; by whatsoever authority the same may be levied, and according to the true tenor and effect, and shall keep and perform all the covenants, agreements and stipulations on its part herein contained, then these presents and the trusts hereby created, and all the estate, right, title and interest hereby vested in the said trustees, their successors

or assigns, in the trust, shall cease and determine as fully as if this mortgage had never been executed, and in that case the said parties of the second part and their successor or successors in the said trust, on demand by said Railroad Company, and the cancellation of the bonds and coupons hereby secured, shall execute and deliver to it all such instruments as may be necessary to discharge and cancel this mortgage.

AND, PROVIDED FURTHER, that until default shall be made by the Railroad Company, its successors or assigns, in the payment of the principal or interest of the said bonds hereby created, or some of them, or in the performance of some other of the covenants, stipulations and provisions on its part herein contained, the Railroad Company shall have and be entitled to the possession, management, operation, use and enjoyment of the property and franchise hereby mortgaged, and the rents, incomes and profits thereof.

IT IS HEREBY COVENANTED AND AGREED by and between the parties hereto, and the Railroad Company, party of the first part, hereby covenants, promises and agrees to and with each of the persons and corporations, firms and partnerships, who may become the holders of said bonds and coupons, or any of them, as follows, to wit:

*First* That, except as hereinafter provided, the total issue of said bonds secured hereby shall be limited to six thousand five hundred (6,500) bonds for the principal sum in the aggregate of Six Million Five Hundred Thousand Dollars ($6,500,000), and that, except as hereinafter provided, no bonds in addition to said six million five hundred thousand dollars ($6,500,000) shall be certified and delivered by the Trustees.

The said six thousand five hundred (6,500) bonds are to be used and disposed of as follows, to wit:

One thousand (1,000) bonds for the principal sum in the aggregate of one million dollars ($1,000,000) are to be

used for the purpose of repaying or retiring eight hundred and twelve (812) six per cent. bonds of one thousand dollars ($1,000) each, heretofore issued by the Lake Street Elavated Railway Company, for the principal sum in the aggregate of eight hundred and twelve thousand dollars ($812,000), and said one thousand (1,000) bonds secured hereby are to be reserved by the Trustees in its possession, and certified and delivered only in exchange for or to retire or pay a proportionate number of said six per cent. bonds of said Elevated Railway Company; that is to say, whenever any of said six per cent. bonds now outstanding be paid or retired, they shall be canceled, and, thereupon the Trustee shall certify and deliver to the Company, or to its order, a proportionate number of the said one thousand (1,000) bonds hereby secured and reserved, as aforesaid, which bonds may then be used by the said Company for its corporate purposes in the discretion of its Board.

Five thousand one hundred and fifty (5,150) of said bonds hereby secured, for the principal sum of five million one hundred and fifty thousand dollars ($5,150,000), or the money derived from the sale thereof, are to be used to complete and acquire that part of the railroad of the said company which extends from Market street west to West Fifty-second street, in the City of Chicago, and also the loop beginning and ending at said Market street, as provided by ordinances passed by the city council of the City of Chicago, November 24, 1890, granting the right to construct said railroad or such work as may be substituted for said loop.

Three hundred and fifty (350) of said bonds, for the principal sum of three hundred and fifty thousand dollars ($350,000), are to be used for the lawful purposes of said Company in the discretion of the Board of Directors.

The said five thousand one hundred and fifty (5,150) bonds and said three hundred and fifty (350) bonds are to be certified and delivered by the Trustee on the order of the Board of Directors or the Executive Committee of the Company. Bonds may be issued in addition to said six thousand five hundred (6,500) for the following purposes only:

(*a*) In adding to, extending and building additional railroad and branches of said railroad and acquiring railroads by construction or otherwise, at not exceeding eight hundred and fifty thousand dollars ($850,000) of bonds per mile for a two-track road fully equipped with rolling stock, stations, switches, signal stations and necessary appurtenances.

(*b*) Paying, adjusting or settling claims or suits for damages arising out of the building or operation of said railroad or extensions or branches.

(*c*) Procuring right of way and such other real estate as may be needed by the Railroad Company in extending, adding to and building branches of said railroad

(*d*) Paying any interest that may accrue and remain unpaid during the first two years of the operation of the railroad, provided to be constructed in said construction contract, after delivery and acceptance of said railroad from the contractors for the same, after applying to the payment of such interest the net earnings of the railroad during the said two years.

(*e*) In case the railroad shall eventually cross the Chicago river or either of its branches upon its own bridge, not exceeding five hundred thousand dollars ($500,000) of bonds for each such bridge and its approaches.

*Second.* Said bonds to be issued in addition to the six million five hundred thousand dollars ($6,500,000) of bonds are only to be issued by resolution or order of the Board of Directors of the Railroad Company, that additional bonds are required for the purposes hereinbefore set forth, and the proceeds from the sale of said bonds shall only be used for the purposes therein set forth and for no other. The certificate of the president or vice-president and chief engineer of the Railroad Company as to the existence of the facts necessitating the issue of said additional bonds for the

purposes aforesaid, together with certified copies of the resolution or order of the Board of Directors aforesaid, shall be furnished to the Trustee, and written orders, copies, resolutions and certificates shall in each and every case be sufficient and conclusive evidence to said Trustees to a statement therein made and contained, and shall duly protect the Trustees in respect of a certification and delivery of any of said bonds thereunder, and no duties shall be imposed on the Trustees to look behind the same or any thereof before certifying and delivering bonds thereunder. To further assure this provision the said Trustees, if they deem proper so to do, may appoint an agent of known integrity and business capacity, with full power to dismiss him and appoint another in his stead at pleasure, who shall have the right to attend all meetings of the Board of Directors, have free access to, and from time to time, examine all books of account of the party of the first part, appertaining to the application and expenditure of said proceeds of the sale of all of said bonds issued in excess of said six thousand five hundred (6,500) bonds, and shall make full report thereof to the Trustees every three months, and as much oftener as they may, from time to time, require, for the information of the bondholders under this mortgage, and the Railroad Company shall pay said agent a reasonable compensation for his services during the time of the construction of said railroad, for which additional bonds are desired as aforesaid, not to exceed, however, one thousand dollars ($1,000) per annum.

*Third.* The Company shall keep an agency in the City of New York while said bonds are outstanding for the payment of the principal and interest thereof, and shall keep at said agency books on which the transfer of any bond shall, upon request, be registered, without expense to the holder. Each registration of a bond shall be noted thereon, after which no transfer thereof can be made except on said books, until after registered transfer to bearer, when the bond will again become transferable by delivery until again registered in like manner in the name of the holder. The Trustee shall have access to the said books at all reasonable times, and upon request in

writing shall have a list of registrations shown thereon at any specified date. For the purpose of administering the trust created by this mortgage, the person in whose name any bond is registered on said books shall be taken to be the owner thereof. The coupons annexed to any bond issued hereunder, whether the bond be registered or not, will always be transferable by delivery.

*Fourth.* The Railroad Company covenants and agrees that so long as it shall hold possession and enjoy the property and franchises hereby mortgaged or expressed or intended so to be, it will pay and discharge all taxes, assessments and other governmental charges levied or imposed thereon during the continuance of this mortgage, that it will not suffer any lien superior to the lien hereby created to attach to said property or franchises or to any part thereof; that it will not permit or suffer any waste thereof; that it will keep and maintain the property hereby mortgaged in good order and condition; that it will keep all property hereby mortgaged, liable to be destroyed by fire, reasonably insured, and in case of destruction by fire, all insurance money shall be promptly applied to replace such property as may be destroyed or to purchase of other property needed for the maintenance or operation of said railroad, and such replaced property shall immediately become subject to this mortgage. Such insurance shall be effected in companies satisfactory to the Trustees, the policies to be delivered to and kept by the Trustees, and to be made payable to the Trustees or their successors. The Trustees, however, shall be under no obligation to determine the amount of such insurance.

*Fifth.* If default shall be made in the payment of any interest money mentioned in the said bonds or coupons or any or either of them, when the same becomes due and is demanded, and if such default shall continue for a period of six months after such demand and no extension thereof shall be granted by the holders thereof, the Trustees, or their successor or successors in the trust hereby created, may, if thereunto requested in writing, under seal, by the holders of one-quarter in interest of the said bonds then outstanding, and shall, if

thereunto requested in writing, under seal by the holders of a majority in interest of said bonds then outstanding, declare the principal of all the bonds hereby secured then outstanding to be and the same shall thereupon become immediately due and payable, anything contained in said bonds or herein to the contrary notwithstanding.

*Sixth.* If default shall be made in the payment of any interest moneys mentioned in the said bond and coupons, or any or either of them, when the same becomes due and demanded, whether such default shall have continued for the said period of six months or not, the Trustees may and upon the request in writing by the holders of a majority in interest of the said bonds then outstanding, and upon being indemnified to their satisfaction for their expenses and liabilities, shall enter into and take full possession of said railroad, and of all property hereby mortgaged or expressed, or intended so to be, and hold, use, manage, maintain and operate said railroad by such agent and managers as such Trustees may appoint; collect and receive all moneys and revenues arising from such management and apply the same to the expenses of the Trustees in the performance of the trust, including a reasonable compensation for their own services, the services of their counsel, attorneys, agents and other servants, and next to the maintenance, management and operation of the said railroad and of the property belonging thereto, hereby mortgaged, including the payment of taxes, assessments, and other governmental charges, damages and such useful additions, alterations or repairs to the mortgaged property or any of it as the Trustees may think proper to be made, and next to the payment *pro rata* of the interest due, and in default of said bonds. In case all the said payments shall have been made in full and no suit to foreclose this mortgage shall have been begun, the Trustees, after making such provisions as to them may seem advisable for the payment of the next semi-annual installment of interest to fall due, shall restore to the Railroad Company, its successors or assigns, the possession of the premises hereby mortgaged. This power of entry may be exercised as often as occasion therefor shall arise

in the judgment of the Trustees pending this trust, and the Trustees may, so long as any interest remains in default, continue to exercise the power herein granted for such period or periods as they may deem expedient, unless and until the holders of a majority in interest of the bonds secured hereby, then outstanding, shall otherwise in writing request.

*Seventh.* The provisions contained in Article Fifth of this mortgage shall not be construed to preclude the Trustees or their successors from enforcing any appropriate remedy against the Railroad Company or its property and franchises hereby mortgaged by foreclosure or otherwise.

If default shall be made in the payment of principal or of any interest moneys mentioned in said bonds and coupons, or any or either of them, or any part thereof, when the same becomes due and is demanded, or in the performance of any covenants, promises or agreements on the part of the Railroad Company herein contained, and if such default shall continue for a period of six months, the Trustees may, in their discretion, upon being requested in writing by the holders of a majority in interest of said bonds outstanding and upon being indemnified to their satisfaction against costs and expenses which may be incurred by acting in pursuance of such request, shall either after entry as hereinbefore provided, or without such entry, proceed by suit or suits at law or in equity, as the said Trustees may be advised, to enforce payment of the said bonds and to foreclose this mortgage, and to sell the railways, lands, premises, franchises, rights, appurtenances and property of whatsoever kind or nature, and wheresoever situated, hereby conveyed, under the judgment or decree of a court or courts of competent jurisdiction. In case the Trustees shall proceed by suit or suits at law, or in equity, after default as above provided in said trust deed, shall be entitled to have the premises, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, sold at judicial sale under the order of a court or courts of competent jurisdiction, for

or towards the satisfaction of the principal or interest or both, due and owing upon the bonds then outstanding, issued under or entitled to the benefits of the security of this mortgage, and for the enforcement of the rights, liens and securities of the Trustees and the bondholders, and shall be entitled, pending any such suit or proceedings, to a receivership of such railways, lands, premises, franchises, rights, appurtenances and property of the fares, freights, tolls, earnings, revenues, issues, profits and income thereof.

And the said Railroad Company doth for itself, its successors and assigns, hereby further covenant and agree by and with the Trustees, that at and immediately upon the commencement, by the Trustees, of any suit or any other legal proceeding to obtain possession of the premises hereby mortgaged and conveyed upon the default in the performance of any of the covenants herein contained, the said Railroad Company, its successors and assigns, shall and will severally, waiving the issue and service of process, enter their voluntary appearance in such suit or proceeding and consent to the entry of a judgment for the recovery and possession of said premises and every part thereof, and that at and upon the commencement by the Trustees of any suit or proceedings upon default in the performance of any of the covenants herein contained, for the foreclosure of this mortgage, the Railroad Company, its successors and assigns, shall and will severally waiving the issuance and service of process, enter their voluntary appearance in such suit or proceeding and consent to the appointment of a receiver of said property, and the tolls, income and revenue thereof, for the sole benefit of the holders of the said bonds secured hereby.

*Eighth.* Every holder of the bonds secured hereby accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, under this indenture, is vested exclusively in the Trustees, and under no circumstances shall the holder of any bonds or coupons, or any number of such holders have any right to institute any action at law upon any coupon or coupons, or other-

wise, or any suit or proceedings in equity or otherwise, under this indenture, for the purpose of enforcing any payment, covenant or remedy, herein, or in said bonds contained, or to foreclose this mortgage except in case of refusal on the part of the Trustees to perform any duty imposed on them by this indenture in respect to such payment, covenant, remedy or foreclosure after demand by a holder or holders of such bonds or coupons, and the production of such bonds or coupons by the holder thereof to the Trustees, or the furnishing by such holders of other evidence satisfactory to the Trustees that they are such holders, and the giving to the Trustees of an indemnity satisfactory to them securing them against liability by reason of the action requested, but no inaction by said Trustees upon any such request shall be deemed a refusal until after the expiration of a reasonable time for the consideration thereof by said Trustees.

In every case in which the Trustees are authorized or required under any provision of this instrument to take any action upon the request of the holders of said bonds, the Trustees shall have the right to require the person or persons presenting such request to furnish proof as to the ownership of the bonds represented by him or them by the production of said bonds, or by affidavits or other evidence satisfactory to the Trustees, and if such proof be so required, the said request will be without effect until such proof shall be furnished.

*Ninth.* Upon any sale of the property and franchises hereby mortgaged, or any part thereof, the purchaser in making payment therefor shall be entitled, after paying in cash so much as shall be necessary to cover the costs and expenses of the sale and of the proceedings incident thereto, and all other charges that may be decreed to be paid in cash, to appropriate and use towards the payment of the remainder of the purchase price any of the bonds or coupons issued hereunder and entitled to participate in the proceeds of such sale, reckoning each bond or coupon so appropriated and used at such sum as shall be payable thereon out of the net proceeds of the sale, and proper receipts shall thereupon be given to the holders of such

bonds or coupons for the amount so payable thereon, and bonds or coupons, if the net proceeds of the sale shall be sufficient to pay them in full, shall be delivered up to the person making the sale under decree of the court for cancellation; or if the proceeds of the sale shall not be sufficient to pay such bonds or coupons in full, then proper endorsements shall be made thereon of the amount so paid, and they shall then be returned to the holders.

*Tenth.* The Trustees shall permit such necessary changes to be made in the line of said railroad as may be in their judgment advisable and advantageous to be made, and any property acquired by the Railroad Company in consequence of such changes shall immediately become subject to this mortgage.

*Eleventh.* While the Railroad Company shall be in possession of the mortgaged premises, and there shall be no existing default in the payment of principal or interest of any of said bonds, or in the performance of any of the stipulations, conditions and provisions on the part of the Railroad Company in this mortgage contained, the Railroad Company, its successors and assigns, may, from time to time, sell or otherwise dispose of, free and clear from the lien of this mortgage, any rolling stock, equipment or other personal property held or intended for use upon the said railroad, which shall have become worn out or otherwise unsuitable for use, or, whenever it shall be intended to replace the same by other rolling stock or equipment or personal property; provided, however, that such sale or disposition shall not impair or reduce the efficiency of the rolling stock, equipment or other personal property required for the operation of the said railroad, and all rolling stock, equipment and personal property which shall from time to time be acquired for use upon or in connection with said railroad by the said Railroad Company, its successors or assigns, with the proceeds of any such sale or disposition or otherwise, shall be subject to the lien of this mortgage.

While the Railroad Company shall be in possession of the mortgaged premises, and there shall be no existing default as aforesaid, the Trustees shall have full power and authority, in their discretion, upon the written request of the Railroad Company, and upon the delivery to them of an attested copy of the resolution of the Board of Directors of the Railroad Company authorizing the same to release or convey any land or other real property hereby mortgaged, which in the judgment of the Board of Directors of the Railroad Company are not required for the purpose of constructing, maintaining or operating the said railroad, and which the Railroad Company shall in good faith sell and desire to have released and conveyed in order to give good title to the purchasers, and all the proceeds arising from the sale of such land or real property shall either be applied to the purchase of other property for the Railroad Company, which shall immediately become subject to this mortgage and which in the judgment of the Trustees is of equal value and benefit to the Railroad Company or at the option of the Trustees, all the proceeds arising from the sale of any such lands or real property shall be paid over to them to be used by said Trustees in the purchase of one or more of the bonds hereby secured in the following manner:

Upon the receipt by the said Trustees of any of such proceeds, they shall advertise in a newspaper published in the City of New York, State of New York, and in the City of Chicago, Illinois, for four successive weeks for proposals for the sale to them of bonds secured by this mortgage, and upon the coming in of such proposals they shall apply such proceeds to the purchase of such bonds at the lowest price at which the same can be obtained.

In case no proposals shall be so received or in case the proposals so received be not for an amount of bonds sufficient to exhaust all of said proceeds in the hands of the Trustees, the Trustees shall apply said proceeds or the balance thereof not applied to the purchase of bonds secured hereby upon the New York Stock Exchange, or Chicago Stock Exchange, or at the market price thereof.

All bonds and coupons purchased by the said Trustees under the foregoing provisions shall be forthwith canceled by them and surrendered to the Railroad Company and shall not again be issued. Provided, always, however, that no portion of the main line or branches of said railroad, or any part of the principal depots, stations or terminal facilities or other property which in the judgment of the Trustees is or may be essential to the due operation of the said railroad, shall be so released unless replaced by property which in the judgment of the Trustees is of equal value and of equal benefit to the efficient operation of said railroad. Provided that the Trustees may consent to the release of that part of the railroad within the South Division of the City of Chicago, upon such terms and conditions as they may impose. The said Trustees shall not be subject to any liability to any person or persons by reason of any act done or performed in good faith under the provisions of this Article.

*Twelfth.* The Railroad Company further covenants that it will not apply for, or avail itself of any injunction or stay of proceedings, or plead, or in any way take advantage of any extension law, stay-law, valuation law, redemption law, appraisement law, or any other law, whether now in force, or which may hereafter be in force, which may in any way alter, impair or impede the right or remedies of the holders of the bonds issued hereunder or of the Trustees, or which shall affect or change the time, place, means, or mode of perfecting or enforcing such rights or remedies.

*Thirteenth.* The Railroad Company for itself its successors and assigns, hereby further covenants and agrees to, and with the Trustees and their successors in the trust, and to and with the respective persons and corporations who shall, at any time the holders of the said bonds hereby secured, or any of them, that the Railroad Company, its successors and assigns, shall and will at any time, and from time to time thereafter, make, do, execute and deliver all such further acts, deed and things, as shall be reasonably advised, devised or required to effectuate the intention of these presents, and

to secure and confirm to the said Trustees and their successor, or successors in trust, all and singular the property and estate, real and personal, and the rights, privileges and franchises hereinbefore described, and hereby intended to be mortgaged and conveyed, and so render the same, and especially such portions thereof as shall be hereafter acquired by the Railroad Company, its successors and assigns, available for the security and satisfaction of the said bonds, according to the intent and purposes herein expressed.

*Fourteenth.* Each of the bonds hereby secured is issued upon the express condition, to which each successive holder thereof expressly assents by receiving the same, that no stockholder or officer of the Company shall be held personally liable to pay any part of the principal or interest of said bond, or the indebtedness evidenced thereby, by virtue of any law now in force or hereafter enacted, and each successive holder of any such bond, by receiving the same, expressly waives any right he may now or hereafter have to proceed against the stockholders or officers of the Company for the payment of said bonds or the consideration thereof, or any part thereof, and agrees to have recourse for such payment only against the Company and the property thereof.

*Fifteenth.* It is understood and agreed that the Trustees shall not, nor shall either of them, be required to take any step in the execution of the trusts hereby created, or in the enforcement of their rights or powers hereunder, if in their or his opinion such action shall be likely to involve them or either of them in expense or liability, unless one or more of the bondholders shall, as often as required by the Trustees, give them reasonable indemnity against the same, anything herein contained to the contrary notwithstanding, and that the Trustees and their agents, attorneys and counsel shall be entitled to a reasonable compensation for all services rendered in connection with the trusts hereby created, or in pursuance of the provisions of this indenture, the Railroad Company agrees to pay to the Trustees such compensation, and also all expenses reasonably incurred by the Trustees hereun-

der, and the Trustees shall have a lien therefor on the mortgaged property and the proceeds thereof.

It is further understood and agreed by and between the parties hereto, that the Trustees shall not be answerable for any default or miscarriage of any agent or attorney by them or either of them appointed hereunder, if such agent or attorney was selected with reasonable care nor for the default of each other, nor for any error or mistake of judgment made by them or either of them in good faith, but shall only be liable each for its own individual wilful misconduct in the execution of said trusts; and it is further understood and agreed that the Trustees are not required to insure any of the property hereby mortgaged unless placed in funds wherewith to effect such insurance, nor is either of them to see to the recording or filing of this indenture as a mortgage or deed of real or personal property, or to take any action or to do any act made requisite by statute for protecting, perpetuating or keeping good the lien of these presents upon the whole or any part of the hereby mortgaged railroad, real and personal property, fixtures, machinery and premises, save in their discretion, but the Railroad Company, its successors and assigns, shall and will, from time to time, do all things needful in that behalf.

The Trustees, or either of them, may resign and thereby become discharged from the trusts hereby created, by notice in writing to be given to the Railroad Company and published once a week for two successive weeks in a newspaper in the cities of Chicago and New York, at least two months before such resignation shall take effect, but such resignation shall take effect immediately upon the appointment of a new Trustee herein, in place of the Trustee resigning, if such new Trustee shall be appointed before the time limited by such notice.

In case at any time hereafter, either of the said Trustees or any Trustee hereafter appointed, shall die or resign, or be removed, or otherwise cease to act, or become incapable of acting, the successor or successors of such

Trustee shall be appointed by the surviving or remaining Trustee, by an instrument in writing, subscribed by it, or if there be none, then by the Railroad Company, by an instrument under the seal of said Company, or in case no such appointment shall be made within thirty days after a vacancy occurs, then by any judge of the United States Circuit Court for the Seventh Circuit upon the application of the holders of not less than one million dollars of principal of the said bonds then outstanding; provided, nevertheless, and it is hereby agreed and declared that in case the holders of a majority in interest of said bonds then outstanding, be dissatisfied with any Trustee or Trustees so appointed, a new Trustee or Trustees to be nominated by the holders of a majority in interest of said bonds then outstanding shall be appointed in its or their place by a judge of said court upon application by the holders of such majority and eight days' written notice thereof given to said Railroad Company.

Any new Trustee or Trustees appointed hereunder shall execute, acknowledge and deliver to the remaining Trustee, or to the Trustees last in office, or if there be none, to the Railroad Company an instrument accepting such appointment hereunder, and thereupon such new Trustee or Trustees shall become vested with all the property, rights, duties and trusts of a Trustee hereunder with like effect as if named as Trustee herein, and the Trustee or Trustees removed or resigning, shall, on the written request of the new Trustee or Trustees, who may be appointed, immediately execute an instrument of transfer to vest in such new Trustee or Trustees upon the trusts herein expressed, all the property, privileges and rights hereunder, of the Trustee or Trustees so resigning or removed, and shall duly assign, transfer and deliver to such new Trustee or Trustees any moneys held hereunder for the further security of the bondholders.

It is understood and agreed that the word "Trustee" or "Trustees" as used in this instrument, shall be held and construed to mean the parties of the second and third parts, or their successor or successors, for the time being, in the trust hereby created, and the words "Railroad

Company " shall be held and construed as including the lawful successors and assigns of the said Company.

Meetings of holders of the bonds secured by this instrument for the determination of, or action upon any of the provisions of this indenture which the majority in interest of the bondholders may have the right to decide, may be called by the Trustees, and the bondholders may vote thereat by person or by proxy; or such other regulations or by-laws in respect to such meetings may be from time to time established, altered or repealed by the bondholders acting by a majority in interest as to them shall seem expedient, and any bondholder attending any such meeting shall have the right to require that any act or resolution of the bondholders affecting the rights or remedies of, or for the benefit of the bondholders, or the duties of the Trustees, or the interest of the trust thereby created shall be authenticated by the signatures of all the persons assenting thereto, as well as by a minute of the proceedings at such meeting.

*Lastly.* The parties of the second and third parts have become parties hereto in order to signify their acceptance of the trusts hereby created.

In witness whereof, the said party of the first part has caused its corporate seal to be hereto affixed and attested by its Secretary, and this instrument to be signed in its corporate name by its President, and the parties of the second and third parts have each caused its corporate seal to be hereto affixed and attested by their respective Secretaries, and this instrument to be signed in their respective corporate names by their respective Presidents.

THE LAKE STREET ELEVATED RAILROAD COMPANY,
Seal of The Lake Street Elevated Railroad Company.
By JOHN A ROCHE,
President.
Attest: O. W. BRUNER,
Secretary.

THE AMERICAN TRUST AND SAVINGS BANK,
Seal of The American Trust and Savings Bank
By G. B. SHAW,
President.
Attest: J. R. CHAPMAN,
Secretary.

THE FARMERS' LOAN AND TRUST COMPANY,
Seal of The Farmers' Loan and Trust Company.
By R. G. ROLSTON,
President.
Attest: E. S. MARSTON,
Secretary.

COPY OF PETITION OF THE FARMERS' LOAN AND TRUST COMPANY TO REMOVE CAUSE TO UNITED STATES COURT, VERIFYING STATEMENT IN REPLY BRIEF THAT A SUBSTANTIAL COPY OF PETITION WAS SHOWN ON PAGES 9 AND 10 OF BRIEF FOR LAKE STREET ELEVATED RAILROAD COMPANY, AND PAGE 11 OF BRIEF FOR AMERICAN TRUST AND SAVINGS BANK.

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IN THE SUPERIOR COURT OF COOK COUNTY.

The Lake Street Elevated Railroad Company,
*Complainant,*
*vs.*
Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company,
*Defendants.*

*In Chancery.*
*Gen. No. 172,156.*

PETITION TO REMOVE.

*To the Honorable Judges of said Court:*

Your petitioner, the Farmers' Loan and Trust Company, now comes and, entering its appearance for the purposes of this petition only, and limiting its appearance to making this petition for removal, respectfully shows that it is one of the defendants in the above entitled cause, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000).

Your petitioner further shows that at the time of the commencement of said cause, and ever since, it was and is a corporation organized and existing under and by virtue of the laws of the State of New York, and is not organized under the laws of the State of Illinois or a citi-

zen of said last mentioned state; and that said Lake Street Elevated Railroad Company, said American Trust and Savings Bank and said Northern Trust Company and each and all of them were at the time of the commencement of this cause and still are corporations organized and existing under and by virtue of the laws of the State of Illinois, and are citizens of said state, and are not organized under the laws of the State of New York or citizens thereof.

Your petitioner further shows that in this cause there are controversies which are wholly between citizens of different states, which controversies can be fully determined as between them, and that said controversies are between your petitioner on the one part and said Lake Street Elevated Railroad Company on the other part, and are as follows:

1. A controversy concerning the right of your petitioner to act as trustee under the mortgage, a copy of which is attached to said bill of complaint.

2. A controversy concerning the removal of your petitioner as trustee under said mortgage.

3. A controversy concerning the enjoining of your petitioner from taking any proceedings or bringing or prosecuting any suits or acting under and by virtue of the terms, provisions and conditions of said mortgage.

Your petitioner further shows that if the controversy in this cause is one and inseparable, then that such controversy is wholly between citizens of different states and can be fully determined between them, and that said controversy is between your petitioner on one part and the said Lake Street Elevated Railroad Company on the other part, and that said other defendant, the American Trust

and Savings Bank and the Northern Trust Company are not proper or necessary parties in this cause.

Your petitioner further shows that on the 30th day of January, A. D. 1896, it exhibited in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, its bill in chancery for a foreclosure of the said mortgage, and in so doing was acting under and by virtue of the terms, provisions and conditions of said mortgage; that its said bill of complaint was filed prior to the commencement of this suit, or of any notice thereof to your petitioner of the temporary injunction issued in this cause, and that the suit so commenced by your petitioner is still pending and undetermined; that the bringing of this suit and the issuing of said injunction tends to obstruct and impede the administration and jurisdiction of the said ircuit Court of the United States in the suit so commenced by your petitioner in said Circuit Court of the United States and interferes with the property thereby brought into said Circuit Court, and that there is, therefore, involved in this suit a controversy arising under and by virtue of the laws of the United States, which controversy affects the jurisdiction of said Circuit Court of the United States in said cause so commenced therein by your petitioner.

Your petitioner offers herewith a good and sufficient bond in the penal sum of five hundred dollars ($500), conditioned for its entering in said Circuit Court of the United States, for the Northern District of Illinois, Northern Division, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded if said Circuit Court of the United States shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner, therefore, prays this honorable court to proceed no further herein, except to make an order of removal as required by law, and to accept the said surety and bond and to cause the record herein to be removed to said Circuit Court of the United States within and for the Northern District of Illinois, Northern Division, according to the statute in such case made and provided.

And your orator will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By TURNER, MCCLURE & RALSTON,
RUNNELLS & BURRY,
*Its Solicitors.*

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

William Burry, being duly sworn, on oath deposes and says that he is one of the solicitors for the petitioner in the foreging petition; that he has read said petition and knows the contents thereof, and that the matters and things therein stated are true as he verily believes.

WILLIAM BURRY.

Subscribed and sworn to before me this 31st day of January, A. D. 1896.

*Notary Public.*

COPY OF OBJECTIONS OF AMERICAN TRUST AND SAVINGS BANK TO APPROVAL OF BOND, VERIFYING STATEMENT IN REPLY BRIEF IN ANSWER TO OBJECTIONS BY PLAINTIFF IN ERROR THAT NO OBJECTIONS WERE MADE TO THE BOND.

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STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE SUPERIOR COURT OF SAID COOK COUNTY.

The Lake Street Elevated Railroad Company
*vs.*
The Farmers' Loan and Trust Company *et al.*
} *Gen. No. 172,156.*

Now comes the American Trust and Savings Bank, defendant herein, and objects to the removal of said above entitled cause in and to the Circuit Court of the United States for the Northern District of Illinois, Northern Division thereof, as prayed for in and by a certain petition for removal, filed herein on January 31, 1896, by the Farmers' Loan and Trust Company, one of the defendants herein, and for cause of said objection states the following:

1. That said petitioner has not filed a good and sufficient bond, as provided in and by the statutes of the United States, in and for such cases made and provided.

2. That the said bond filed herein is insufficient in form and substance.

3. That in and by said cause herein there are not controversies which are wholly between citizens of different states, and that said controversies are not separable, and that said controversies are not wholly between said Lake

Street Elevated Railroad Company and the said petitioner, said Farmers' Loan and Trust Company.

4. That this objector is a proper and necessary party.

5. That said defendant, the Northern Trust Company, is a proper and necessary party.

6. That this objector and said Northern Trust Company are not made parties defendant to said bill for the purpose of making a controversy or cause of action wherein a citizen of the State of Illinois is complainant and citizens of the State of Illinois are defendants.

7. That there is not involved in this suit a controversy arising under and by virtue of the laws of the United States, which controversy affects the jurisdiction of said Circuit Court of the United States.

Wherefore, and for divers other good causes, this objector objects to the removal of said cause as aforesaid and prays that the petition for said removal be denied.

THE AMERICAN TRUST AND SAVINGS BANK,
By MORAN, KRAUS & MAYER,
*Its Solicitors.*

Filed February 1, 1896.

COPY OF ASSIGNMENT OF ERRORS IN SUPREME COURT OF ILLINOIS AND IN SUPREME COURT OF UNITED STATES, VERIFYING STATEMENT IN REPLY BRIEF THAT NO OTHER FEDERAL QUESTION WAS RAISED IN THE SUPREME COURT OF ILLINOIS OTHER THAN THE REMOVABILITY OF THE CAUSE, AND THAT PLAINTIFF IN ERROR IS PRECLUDED FROM ARGUING ANY OTHER FEDERAL QUESTION.

IN THE SUPREME COURT OF ILLINOIS, NORTHERN GRAND DIVISION, MARCH TERM, A. D. 1897.

| | |
|---|---|
| The Farmers' Loan and Trust Company, *Appellant*, | *Appeal from* |
| *vs.* | |
| The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company, *Appellees.* | *Appellate Court. First District.* |

ASSIGNMENT OF ERRORS

1. The said Appellate Court in and for the First District of Illinois erred in affirming the decree herein of the Superior Court of Cook County.

2. The said Appellate Court erred in not reversing the decree herein of said Superior Court of Cook County.

3. The said Appellate Court erred in not reversing the decree herein of said Superior Court of Cook County, and in not remanding the case to said Superior Court.

4. The said Appellate Court erred in not reversing the said decree of said Superior Court, and in not remanding the cause to said Superior Court, with directions to dismiss the bill of complaint herein.

5. The judgment of said Appellate Court, affirming said decree of said Superior Court, is void for want of jurisdiction.

6. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering herein, on the third (3rd) day of February, 1896, the order of that date set out in the transcript of record herein, and in not reversing the cause on account of said error of said Superior Court.

7. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, in and by said order, entered herein on the third (3rd) day of February, 1896, that the motion with petition and bond for the removal of this cause to the United States Circuit Court be denied, and in not reversing the cause, on account of said error of said Superior Court.

8. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in denying the petition of the appellant, The Farmers' Loan and Trust Company, for the removal of this cause to the United States Circuit Court, and in not reversing the cause, on account of said error of said Superior Court.

9. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in not accepting the petition and bond for removal to the United States Circuit Court, filed herein by appellant, The Farmers' Loan and Trust Company, and in not ordering the removal of the case to said United States Circuit Court and in not reversing the cause, on account of said error of said Superior Court.

10. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in retaining

jurisdiction of this cause after the filing herein, and presentation to said court, of said petition and bond for removal to the United States Circuit Court by appellant, The Farmers' Loan and Trust Company, and in not reversing the cause on account of said error of said Superior Court.

11. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in taking proceedings in this cause after the filing herein and presentation to said court of said petition and bond for removal to the United States Circuit Court by appellant, The Farmers' Loan and Trust Company, and in not reversing the cause on account of said error of said Superior Court.

12. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering the said decree of June 4, 1896, herein, after the filing herein and presentation to said court of said petition and bond for removal to the United States Circuit Court by appellant, The Farmers' Loan and Trust Company, and in not reversing the cause on account of said error of said Superior Court.

13. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering herein, on the 18th day of March, A. D. 1896, the order of that date set forth in the transcript herein, and in not reversing the cause on account of said error of said Superior Court.

14. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in finding in and by said order, entered herein on said 18th day of March, A. D. 1896, that it had jurisdiction of the parties

and the subject-matter of this cause, and in not reversing the cause on account of said error of said Superior Court.

15. The said Appellate Court erred in not holding that the said decree entered herein by the Superior Court of Cook County on the fourth (4th) day of June, A. D. 1896, is void for want of jurisdiction, and in not reversing the cause on account of said error of said Superior Court.

16. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in finding and adjudging in and by said decree, entered herein on the fourth (4th) day of June, A. D. 1896, that it had jurisdiction of the cause and of all the parties hereto, and in not reversing the cause on account of said error of said Superior Court.

17. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in proceeding in this case and in entering herein said decree (entered herein on the fourth (4th) day of June, A. D. 1896) after the docketing of the cause in the United States Circuit Court, and the motions to remand the same made in said United States Circuit Court by said complainant, The Lake Street Elevated Railroad Company, and by the defendants, The American Trust and Savings Bank and The Northern Trust Company, respectively, and the order of said United States Circuit Court denying said motions to remand, and the other proceedings in said United States Circuit Court shown in evidence on the hearing of this cause in the court below, and in not reversing the cause on account of said error of said Superior Court.

18. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"It is, therefore, ordered, adjudged and decreed by the court that the said defendant, The Farmers' Loan and Trust Company, be, and the same is hereby, removed as trustee or co-trustee under the said mortgage or deed of trust made, executed and delivered by said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and the said defendant, The Farmers' Loan and Trust Company, as co-trustee, which said mortgage or deed of trust is dated the seventh (7th) day of April, A. D. 1893, and was duly filed for record in the office of the recorder of deeds of the County of Cook, in the State of Illinois, on the 6th day of May, A. D. 1893, and there recorded in book 4,256 of records, at page 230, and which was afterwards and on the 11th day of May, 1893, duly filed in the office of the secretary of state of the State of Illinois, and there recorded in book 12, at page 266," and in not reversing the cause, on account of said error of said Superior Court.

19. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, entered herein on the said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"It is, therefore, ordered, adjudged and decreed by the court that the said defendant, The Farmers' Loan and Trust Company, be and it is hereby removed as trustee or co-trustee under the said mortgage or deed of trust

made, executed and delivered by said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and the said defendant, The Farmers' Loan and Trust Company, as co-trustee," and in not reversing the cause on account of said error of said Superior Court.

20. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"And it is further ordered, adjudged and decreed by the court that the said defendant, The Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each of every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust so made, executed and delivered by the said complainant, The Lake Street Elevated Company, to the said defendant, The American Trust and Savings Bank as trustee, and the said defendant, The Farmers' Loan and Trust Company, as co-trustee," and in not reversing the cause on account of said error of said Superior Court.

21. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"And it is further ordered, adjudged and decreed by the court that the said defendant, The Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company," and in not reversing the cause on account of said error of said Superior Court.

22. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, entered herein on said fourth (4th) day of June, A. D. 1896, that the said defendant, The Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be perpetually enjoined and restrained from acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust made, executed and delivered by said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and said defendant, The Farmers' Loan and Trust Company, as co-trusteee, and in not reversing the cause on account of said error of said Superior Court.

23. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to-wit:

"And it is further ordered, adjudged and decreed that

the said defendant, The American Trust and Savings Bank, as trustee, under the said mortgage or deed of trust, so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and the said defendant, The Farmers' Loan and Trust Company, as co-trustee, do, and it is hereby ordered and directed to appoint, by an instrument in writing, within thirty days from the date of the entry hereof, a co-trustee, under the said mortgage or deed of trust, so made executed and delivered by the said complainant, as aforesaid, in place of the said defendant, The Farmers' Loan and Trust Company, and that upon such successor being so appointed by the defendant, The American Trust and Savings Bank, as aforesaid, such successor shall, upon accepting said appointment as aforesaid, under said mortgage or deed of trust, be and become vested with all the property, rights, duties and trusts of a trustee under said trust deed, with the like effect as if named as trustee therein, and shall likewise be vested with all right, title and interest of said Farmers' Loan and Trust Company under said trust deed, and that the said The Farmers' Loan and Trust Company, on the written request of said new trustee so appointed, shall immediately execute an instrument of transfer to vest in such new trustee, upon the trusts in said trust deed expressed, all the property, privileges and rights thereunder of the said, The Farmers' Loan and Trust Company, and that said The Farmers' Loan and Trust Company shall duly assign, transfer and deliver to such new trustee, so appointed, any moneys held under and by virtue of such trust deed, for the further security of the bondholders, and that, in case of

the failure upon the part of said The Farmers' Loan and Trust Company to make, execute and deliver the instrument as aforesaid, that A. F. Stevenson, master in chancery of this court, is authorized and directed to make, execute and deliver on behalf of said The Farmers' Loan and Trust Company the instrument required by it to be made and delivered as aforesaid, and that such instrument or instruments, when so made, executed and delivered by such master in chancery as aforesaid, shall have the same force and effect as though made, executed and delivered by the said defendant, The Farmers' Loan and Trust Company," and in not reversing the cause, on account of said error of said Superior Court.

24. The said Appellate Court erred in not holding the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, entered herein on said fourth (4th) day of June, A. D. 1896, as follows to wit:

"And it is further ordered, adjudged and decreed that the said defendant, The American Trust and Savings Bank, as trustee under the said mortgage or deed of trust so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and the said defendant, The Farmars' Loan and Trust Company, as co-trustee, do, and it is hereby ordered and directed to appoint by an instrument in writing, within thirty days from the date of the entry hereof, a co trustee under the said mortgage or deed of trust so made, executed and delivered by the said complainant as aforesaid, in place of the said defennant, The Farmers' Loan and Trust Company," and in not reversing the cause on account of said error of the said Superior Court.

25. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"And it is further ordered, adjudged and decreed that said defendant, The American Trust and Savings Bank, as trustee under the said mortgage or deed of trust so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to the said defendant, The American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee, do, and it is hereby ordered and directed to appoint, by an instrument in writing, within thirty days from the day of the entry hereof, a co-trustee under the said mortgage or deed of trust so made, executed and delivered by the said complainant as aforesaid, in place of the said defendant, The Farmers' Loan and Trust Company. And that upon such successor being so appointed by the said defendant, The American Trust and Savings Bank, as aforesaid, such successor shall, upon accepting said appointment as aforesaid, under said mortgage or deed of trust, be, and become vested with all of the property, rights, duties and trusts of a trustee under said trust deed, with the like effect as if named as trustee therein, and shall likewise be vested with all the right, title and interest of said Farmers' Loan and Trust Company under said trust deed," and in not reversing the cause on account of said error of said Superior Court.

26. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree, en-

tered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"That the said The Farmers' Loan and Trust Company, on the written request of said new trustee so appointed, shall immediately execute an instrument of transfer to vest in such new trustee, upon the trusts in said trust deed expressed, all the property, privileges and rights thereunder of the said The Farmers' Loan and Trust Company, and that said The Farmers' Loan and Trust Company shall duly assign, transfer and deliver to such new trustees, so appointed, any moneys held under and by virtue of such trust deed for the further security of the bondholders," and in not reversing the cause on account of said error of said Superior Court.

27. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing in and by the said decree entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"That in case of the failure upon the part of said The Farmers' Loan and Trust Company to make, execute and deliver the instrument as aforesaid, that A. F. Stevenson, master in chancery of this court, is authorized and directed to make, execute and deliver, on behalf of said The Farmers' Loan and Trust Company, the instrument required by it to be made and delivered as aforesaid, and that such instrument or instruments, when so made, executed and delivered by such master in chancery, as aforesaid, shall have the same force and effect as though made, executed and delivered by the said defendant, The Farmers' Loan and Trust Company," and in not reversing the cause on account of said error of said Superior Court.

28. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in ordering, adjudging and decreeing, in and by the said decree, entered herein on said fourth (4th) day of June, A. D. 1896, as follows, to wit:

"It is further ordered, adjudged and decreed that, upon the failure of the said American Trust and Savings Bank to make the appointment as aforesaid within thirty (30) days that the court hereby reserves the power right, and authority to appoint a co-trustee as successor to said The Farmers' Loan and Trust Company under said trust deed," and in not reversing the cause, on account of said error of said Superior Court.

29. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering said decree, entered herein on said fourth (4th) day of June, A. D. 1896, and in not reversing the cause, on account of said error of said Superior Court.

30. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in not entering a decree herein dismissing the bill of complaint herein, and in not reversing the cause, on account of said error of said Superior Court.

31. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in not entering a decree herein, dismissing without prejudice the bill of complaint herein, and in not reversing the cause, on account of said error of said Superior Court.

32. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in making each and every one of the findings of fact contained in said decree, entered herein on said fourth (4th) day of

June, A. D. 1896, and in not reversing the cause on account of said error of said Superior Court.

33. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in making each and every one of the findings of law contained in said decree, entered herein on said fourth (4th) day of June, A. D. 1896, and in not reversing the cause on account of said error of said Superior Court.

34. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in not finding and adjudging that the holders of the bonds, secured by said mortgage or deed of trust, were necessarily parties to this cause, and in not reversing the cause, on account of said error of said Superior Court.

35. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in not finding and adjudging that the holders of the bonds, secured by said mortgage or deed of trust, other than said Northern Trust Company, were necessary parties to this cause, and in not reversing the cause on account of said error of said Superior Court.

36. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering said decree (entered herein on the fourth (4th) day of June, A. D. 1896), without requiring that the bondholders secured by said mortgage or deed of trust be made parties to the suit, and in not reversing the cause on account of said error of said Superior Court.

37. The said Appellate Court erred in not holding that the Superior Court of Cook County erred in entering said decree, entered herein on the fourth (4th) day of June, A. D. 1896, without requiring that some or all of

the holders of bonds, secured by said mortgage or deed of trust, other than said Northern Trust Company, be made parties to the suit, and in not reversing the cause on account of said error of said Superior Court.

RUNNELLS & BURRY,
HERRICK, ALLEN, BOYESEN & MARTIN,
*Solicitors for the Farmers' Loan and Trust Company, Appellant.*

IN THE SUPREME COURT OF THE UNITED STATES.

| | |
|---|---|
| The Farmers' Loan and Trust Company, *Plaintiff in Error,* *vs.* The Lake Street Elevated Railroad Company, The American Trust and Savings Bank, and The Northern Trust Company, *Defendants in Error.* | *Writ of Error to Supreme Court of Illinois.* |

ASSIGNMENT OF ERRORS.

And now comes the plaintiff in error, The Farmers' Loan and Trust Company, by Herbert B. Turner and William Burry, its attorneys, this 7th day of July, A. D. 1898, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit: that it appears in and by the record and proceedings aforesaid, that said plaintiff in error had and claimed in the Superior Court of Cook County, Illinois, and in the Appellate Court in

and for the First District of Illinois, and in said Supreme Court of Illinois, the right and privilege, under the constitution and statutes of the United States, to remove this case to the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and that in and by its said judgment the Supreme Court of Illinois erroneously decided against said right and privilege of said plaintiff in error.

II.

That said Supreme Court of Illinois erred in rendering its said judgment in this, to wit: that it appears in and by the record and proceedings aforesaid, that the plaintiff in error claimed in said Superior Court and in said Appellate Court and in said Supreme Court of Illinois, the right and privilege, under the constitution and statutes of the United States, to remove this cause to the Circuit Court of the United States for the Northern District of Illinois, Northern Division thereof, and duly filed its petition and bond for such removal, and that, in and by its said judgment, said Supreme Court of Illinois erroneously decided against the said right and privilege of the plaintiff in error, and erroneously held that said bond for removal was not in compliance with the statutes of the United States providing for the giving of the same.

III.

That said Supreme Court of Illinois erred in holding that the bond (set out in the transcript of record herein) for removal of this cause to said Circuit Court of the United States was not made in compliance with the statutes of the United States providing for the giving of same.

IV.

That the Supreme Court of Illinois erred in rendering its said judgment in this, to wit: that it appears, in and by the record and proceedings aforesaid, that the order entered herein by said Superior Court on the 3d day of February, A. D. 1896, and set out in the transcript of record herein, denied the plaintiff in error the right and privilege, under the Constitution and statutes of the United States, to remove this cause to said Circuit Court of the United States, and that said order was erroneous, and that said Supreme Court of Illinois erred in not reversing, because of said erroneous order of said Superior Court, the judgment herein of said Appellate Court of Illinois in and for the First District of Illinois, which affirmed all the orders and decrees entered herein by said Superior Court, and in deciding against said right and privilege of said plaintiff in error.

V.

That said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering, in and by its said order entered on the 3d day of February, A. D. 1896, that the motion of the plaintiff in error, based on its petition and bond, for removal of this cause to the said Circuit Court of the United States, be denied, and in not reversing the cause on account of said error of said Superior Court.

VI.

That said Supreme Court of Illinois erred in not reversing the decree of said Superior Court because it refused to accept the petition and bond filed herein by plaintiff in error for removal of this cause to the said Circuit Court of the United States and to order the removal of the cause to said Circuit Court of the United States, and to proceed no further therein.

VII.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court in retaining jurisdiction of this cause, after the plaintiff in error filed in, and presented to, said Superior Court, its said petition and bond for removal of this cause to said Circuit Court of the United States.

VIII.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in taking proceedings in said cause after the plaintiff in error filed in, and presented to, said Superior Court its said petition and bond for removal of this cause to said Circuit Court of the United States.

IX.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in entering herein on the 4th day of June, A. D. 1896, the decree of that date, set out in the transcript of record

herein, after the plaintiff in error had filed in and presented to said Superior Court its said petition and bond for removal to said Circuit Court of the United States.

X.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court in entering its order of the 18th day of March, A. D. 1896, set forth in the transcript herein, after the plaintiff in error had filed in, and presented to, said Superior Court its said petition and bond for removal of the cause to said Circuit Court of the United States.

XI.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in finding in and by said order, entered in said Superior Court on said 18th day of March, A. D. 1896, that it had jurisdiction of the parties and subject-matter of this cause, after the plaintiff in error had presented to, and filed in, said Superior Court its said petition and bond for removal of the cause to said Circuit Court of the United States.

XII.

That said Supreme Court of Illinois erred in not holding that said Superior Court of Cook County erred in finding and adjudicating, in and by said decree (set out in the transcript of record herein), entered in said Superior Court on the 4th day of June, A. D. 1896, and after the presentation to, and filing in, said Superior Court of said petition and bond for removal of the cause to said Circuit

Court of the United States by the plaintiff in error, that it, said Superior Court of Cook County, had jurisdiction of the cause and of all the parties hereto, and in not reversing the cause on account of said error of said Superior Court.

XIII.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit: that it appears in and by the records and proceedings aforesaid, that said plaintiff in error duly filed in said Superior Court in this cause its bond and petition for removal of this cause to the said Circuit Court of the United States, and presented the same to said Superior Court; that that court thereupon erroneously denied said petition; that thereupon plaintiff in error obtained an order from said Circuit Court of the United States directing the docketing of this cause in said United States Circuit Court; that thereupon plaintiff in error filed a transcript of the record of this cause from said Superior Court in the clerk's office of said United States Circuit Court in accordance with said order so obtained; that thereupon and before taking any further steps in said Superior Court, all of said defendants in error duly entered their general appearance in this cause in said Circuit Court of the United States and there made their several motions to remand this cause to said Superior Court and pressed their said motions for hearing and argued the same fully before said United States Circuit Court; that thereupon said Circuit Court of the United States overruled said motions to remand and held that this cause was properly removed; that said adjudication, so obtained upon the motion and insistence of said defendants in error, thereupon was cou-

clusive, until duly set aside and reversed, of the said questions of removal and jurisdiction; and that said Supreme Court of Illinois erred in not reversing the action of said Superior Court in thereafter exercising jurisdiction in this cause and proceeding with this cause, and in not holding that the said adjudication of said United States Circuit Court was conclusive, until duly set aside or reversed, of said questions of jurisdiction and remanding.

XIV.

That said Supreme Court of Illinois erred in not holding that said Superior Court erred in proceeding in this cause and in entering in said Superior Court said decree entered therein on the 4th day of June, A. D. 1896, after this cause was docketed in said Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and after said The Lake Street Elevated Railroad Company, and The American Trust and Savings Bank and The Northern Trust Company, respectively, moved to remand this cause to said Superior Court and after said Circuit Court of the United States entered the order denying said motions to remand, and the other proceedings in said Circuit Court of the United States, shown in evidence on the hearing of this cause in said Superior Court and in not reversing the cause on account of said error of said Superior Court.

XV.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit: that it appears in and by the record and proceedings aforesaid, that said

Circuit Court of the United States adjudicated the question of its jurisdiction over this cause by entering the orders (set out in the transcript of record herein) docketing this cause in said Circuit Court of the United States, and overruling the motions to remand the cause to said Superior Court, and that such adjudication was conclusive, until duly set aside or reversed, on the said question of jurisdiction, and that said Supreme Court of Illinois erred in not holding that said Superior Court erred in proceeding with the cause, after such adjudication had been made by said Circuit Court of the United States, and in not deciding that said adjudication was conclusive, until duly set aside or reversed, on said question of jurisdiction, and in not reversing the cause on account of said error of said Superior Court.

XVI.

That said Supreme Court of Illinois erred in rendering the said judgment in this, to wit: that it appears in and by the record and proceedings aforesaid that the plaintiff in error had filed a bill to foreclose the mortgage trust deed, dated April 7th, 1893 (set out in the transcript of record herein), in the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and said Circuit Court of the United States had acquired full jurisdiction thereof, prior to the commencement of this suit in said Superior Court of Cook County, Illinois, and that, therefore, said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering, adjudging and decreeing in and by the said decree entered in said Superior Court on said fourth day of June, A. D. 1896, as follows, to wit:

"And it is further ordered, adjudged and decreed by the court that the said defendant, The Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company," and in not reversing the cause on account of said error of said Superior Court.

XVII.

That said Supreme Court of Illinois erred in rendering the said judgment in this, to wit: that it appears in and by the record and proceedings aforesaid that, prior to the commencement of this suit in said Superior Court, the plaintiff in error had filed a bill of foreclosure of the mortgage trust deed, dated April 7, 1893 (set out in the transcript of record herein), in the said Circuit Court of the United States, and said Circuit Court of the United States had acquired full jurisdiction thereof; and that, therefore, said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering, adjudging and decreeing, in and by said decree entered in said Superior Court on said 4th day of June, A. D. 1896, that the plaintiff in error be perpetually enjoined and restrained from "acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust so made, executed and delivered by the said complainant, The Lake Street Elevated Company, to the said defendant, The American Trust and Savings Bank as trustee, and

the said defendant, The Farmers' Loan and Trust Company, as co-trustee," and in not reversing the cause, on account of said error of said Superior Court.

XVIII.

That said Supreme Court of Illinois erred in rendering the said judgment in this, to wit: that from the record in this cause it appears that the plaintiff in error filed a bill to foreclose the mortgage trust deed dated April 7th, 1893 (set out in the transcript of record herein), and that said Circuit Court of the United States acquired full jurisdiction of said foreclosure suit and of said mortgaged property and of the enforcement of said mortgage trust deed prior to the commencement of this cause; that all said defendants in error were made parties to said foreclosure suit and voluntarily appeared therein and answered said foreclosure bill; that in this cause said Superior Court entered a decree in and by which, among others things, it perpetually enjoined and restrained plaintiff in error from proceeding with or prosecuting said foreclosure suit, and that thereby the said Superior Court enjoined or attempted to enjoin a proceeding theretofore pending in said United States Circuit Court, contrary to the laws and statutes of the United States of America, and therefore the said Supreme Court of Illinois erred in not reversing said decree of said Superior Court so enjoining further prosecution to said foreclosure cause.

XIX.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit: that it appears in and by the record and proceedings aforesaid, that said

plaintiff in error had and claimed in said Superior Court of Cook County, Illinois, and in said Appellate Court in and for the First District of Illinois, and in said Supreme Court of Illinois, rights and privileges under the constitution and statutes of the United States, and that in and by its said judgment the Supreme Court of Illinois erroneously decided against said rights and privileges of said plaintiff in error.

Wherefore, the said plaintiff in error, The Farmers' Loan and Trust Company, prays that the judgment of said Supreme Court of Illinois be reversed.

HERBERT B. TURNER,
WILLIAM BURRY,
*Attorneys for said Plaintiff in Error.*

No. 354. 108

Supp'k to Bk. of Record for O.

Court U. S.
OCT 31 1898
JAMES H. MCKENNEY,
Clerk.

354

Filed Oct. 31, 1898.

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1898.**

The Farmers' Loan and Trust Company,
*Plaintiff in Error,*
*vs.*
The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company,
*Defendants in Error.*

Error to Supreme Court, of Illinois.

COPY OF OPINION OF SUPREME COURT OF ILLINOIS, REPORTED OFFICIALLY IN 173 ILL., 439, SHOWING THAT THE STATEMENT OF FACTS IN OPINION WAS MADE BY THE COURT AND NOT BY THE REPORTER.

CLARENCE A. KNIGHT,
Attorney for Lake Street Elevated Railroad Company.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1898.**

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The Farmers' Loan and Trust Company,
*Plaintiff in Error,*
*vs.*
The Lake Street Elevated Railroad Company, The American Trust and Savings Bank and The Northern Trust Company.
*Defendants in Error.*

Error to Supreme Court of Illinois.

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COPY OF OPINION OF SUPREME COURT OF ILLINOIS REPORTED OFFICIALLY IN 173 ILL., 439, SHOWING THAT THE STATEMENT OF FACTS IN OPINION WAS MADE BY THE COURT AND NOT BY THE REPORTER.

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At a Supreme Court, begun and held at Springfield, on Tuesday, the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present—

Joseph N. Carter, Chief Justice.
Alfred M. Craig, Justice.
Jacob W. Wilkin, Justice.
James H. Cartwright, Justice.

Benjamin D. Magruder, Justice.
Jesse J. Phillips, Justice.
Carroll C. Boggs, Justice.
Edward C. Akin, Attorney General.
Edward A. Baxter, Sheriff.

Attest—
Christopher Mamer, Clerk.

Be it remembered, that afterwards, to wit, on the 18th day of June, 1898, the opinion of the court was filed in the words and figures following, to wit:

The Farmers' Loan & Trust Company *vs.* The Lake Street Elevated Rail-Road Company. } *Appeal from First District.*

IN THE SUPREME COURT OF ILLINOIS.

The Farmers' Loan and Trust Company *vs.* The Lake Street Elevated Railroad Company *et al.*

OPINION, FILED JUNE 18, 1898.

This is an appeal from a judgment of the Appellate Court, affirming a decree of the Superior Court of Cook County, removing appellant as trustee under a deed of trust made by the appellee, The Lake Street Elevated Railroad Company, to appellant, the Farmers' Loan and Trust Company, and to appellee, the American Trust and Savings Bank, as trustees, and enjoining appellant from taking any step to foreclose, or otherwise act as trustee under, the trust deed.

The bill was filed by the appellee, The Lake Street

Elevated Railroad Company, on January 30, 1896, and made appellant, the Farmers' Loan and Trust Company, and the appellees, the American Trust and Savings Bank and the Northern Trust Company, defendants. The bill alleges that, on the 7th day of April, 1893, the complainant therein, The Lake Street Elevated Railroad Company, made a mortgage, or trust deed, to the defendants, the American Trust and Savings Bank and the Farmers' Loan and Trust Company, as trustees; that the trust was accepted in writing by the trustees, and that the mortgage or deed of trust was duly recorded on May 16, 1893. A copy of the mortgage was made an exhibit to the bill.

The bill further sets forth the incorporation of the railroad company under the laws of Illinois for the purpose of constructing railways, etc., with a capital stock of $5,000,000, divided into 50,000 shares of $100 each; that in April, 1893, its capital stock was duly increased to $10,000,000 and consisted of 100,000 shares of $100 each; that the Farmers' Loan and Trust Company was a corporation organized under the laws of New York, and had not, prior to the making of the trust deed, nor since, complied with the laws of Illinois requiring a deposit with the Auditor of Public Accounts of $200,000 in stocks of the United States, or municipal bonds of this state, or in mortgages on improved or productive real estate in Illinois, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; that the railroad company did not know that the Farmers' Company had not complied with the laws of Illinois as to making said deposit, and that the Farmers' Company was doing business in Illinois without having made the deposit; that the Farmers' Company had appointed an agent to represent the company to enforce, on

the part of the railroad company, a compliance with the trust reposed in the Farmers' Company under the trust deed; that, under the trust deed, there were certified and delivered by the trust companies the 6,500 bonds referred to therein; that, after the 6,500 bonds had been certified to, additional bonds were issued, which were also certified to by the trust companies and disposed of under the direction of the agent for the Farmers' Company; that, since the acceptance of the trust, the Farmers' Company has transacted and done business through its said agent, in connection with the trust under the trust deed, and was still claiming the right to do business by the execution of the trust assumed by it; that, since the making of the trust deed, the railroad company had built, and was then operating, a railroad in the City of Chicago for the carrying of passengers within said city; that it had been unable to earn sufficient money to pay the interest on its bonded indebtedness; that one William Ziegler, of New York City, conspiring with persons representing 610 bonds of the total issue of 7,574 bonds of $1,000 each, had made a demand upon the trust companies that they proceed to foreclose and take possession of the railroad under the power in the trust deed; that a bill was filed in the Circuit Court of Cook County against Ziegler *et al.*, in which an injunction was issued enjoining them and the trustees from foreclosing the mortgage upon the demand of Ziegler *et al.*, representing 605 of the 610 bonds; that the railroad company was informed by said agent of the Farmers' Company on January 28, 1896, that no other demand had been made upon the trustees, except that made by Ziegler and his associates, but that, although no other person was asking the Farmers' Company to take any action, they filed a bill to foreclose the mortgage for fail-

ure to pay the interest upon the bonded indebtedness; that said interest was paid up to January 1, 1895; that the Farmers' Company, in violation of its duty, and in order to injure and destroy the property and assets of the railroad company, intended to take possession of the property of the railroad company, or attempt to foreclose the trust deed, for a failure to pay the interest falling due on July 1, 1895, and January 1, 1896; that the holders of 6,574 of the bonds had requested the trustees to take no action with reference to the failure of the company to pay the coupons due July 1, 1895, and January 1, 1896; that the American Trust and Savings Bank, on January 28, 1896, refused to join the Farmers' Company to enforce the trust deed on account of such failure; that the holders of over 6,590 of the bonds, issued under the trust deed, desired that the Farmers' Company should be removed from its position as trustee for failure to comply with the law of Illinois, requiring said deposit with the auditor of public accounts, and for assuming to take proceedings under the trust deed contrary to the request of the holders of a majority of the bonds issued under the trust deed.

The bill prays that a new trustee may be appointed by the court under the trust deed in place of the Farmers' Company; that an injunction be issued enjoining the Farmers' Company from taking any proceedings under the deed of trust, and for such other, and different relief, as equity may require.

An injunction was granted and served on the agent of the Farmers' Comyany at 11:10 A. M., January 30, 1896; summons was served on said agent on February 6, 1896. On January 31, 1896, the Farmers' Company filed a petition and bond in the Superior Court for the removal of the cause to the United States court. The petition was

signed by the Farmers' Loan and Trust Company by its solicitors. The bond, filed with the petition for removal, was executed only by William Burry and Rockwell King, as obligors, and was in the penal sum of $500. On February 3, 1896, the Superior Court denied the motion to remove the cause to the Federal court, and exception was taken thereto by the Farmers' Company.

On March 17, 1896, the Northern Trust Company filed its answer, stating that it was informed that the Farmers' Company had not complied with the laws of Illinois in relation to trust companies, and that, in its belief, the Farmers' Company had been doing business in Illinois, without having made the deposits aforesaid; the answer admits substantially the allegations of the bill as made therein, and also sets forth that the Northern Trust Company is the holder of 6,592 of said bonds, and has not made any demand on either of said trustees to foreclose said trust deed.

On March 18, 1896, the American Trust and Savings Bank filed its answer.

On March 25, 1896, the Farmers' Loan and Trust Company filed its answer, denying substantially all the material allegations of the bill.

On June 4, 1896, a final decree was entered by the Superior Court, finding that the allegations of the bill, as herein set forth, were true, further finding that the bill in this case was filed at 10:35 o'clock on January 30, 1896, and that, within ten minutes after said filing, a subpœna was issued and delivered to the solicitor of the Farmers' Company, and by him delivered to the United States marshal on February 18, 1896, and served on that date; further finding, that the holders of 6,574 of the bonds specially requested the American Trust and Savings

Bank and the Farmers' Loan and Trust Company to take no action whatever under the trust deed; the decree also ordered that the Farmers' Company should be removed as trustee or co-trustee under the deed of trust, and be enjoined from prosecuting any suit to foreclose said trust deed, and that the American Trust and Savings Bank should, by an instrument in writing, appoint a co-trustee in place of the Farmers' Company, and that the Farmers' Company should execute an instrument of transfer to such new trustee of all its rights and powers, etc., and in case of failure of the Farmers' Company to execute such instrument that a master in chancery should do so, and that, upon the failure of the American Trust and Savings Bank to make the appointment within thirty days, the court thereby reserved the power to appoint a co-trustee.

Mr. Justice MAGRUDER delivered the opinion of the court:

*First*—It is claimed, on the part of the appellant that the trial court erred in retaining jurisdiction of the cause after the filing of the petition and bond for its removal to the United States court. There was no error in this action of the trial court. The petition for the removal was signed by the appellant, the Farmers' Loan and Trust Company, one of the defendants in the court below; but the bond filed with such petition for removal was not signed by the appellant. This condition of the bond justified the court in denying the motion for the removal of the cause.

In *Weed Sewing Machine Co.* v. *Smith*, 71 Ill., 204, we said (p. 207): "We think it a reasonable construction of the act (of Congress) to hold that it was the duty of the petitioner to present a bond signed by itself, and sureties

proven to the court to be sufficient. The petitioner filed a bond, not executed by itself, but signed by George S. Thomas and A. S. Alexander, as principals, and certain other parties as sureties. No proof was offered as to the solvency of those who had executed the instrument as sureties, and no explanation given why the petitioner did not sign the bond, or why strangers to the record were filing a bond instead of the defendant in the cause. This cannot be regarded as even a substantial compliance with the act of Congress." As, in the *Weed Sewing Machine Co.* case, the bond was signed by persons not parties to the record, so, here, the bond was signed by Burry and King, neither of whom was a party to the record. The case of *Weed Sewing Machine Co.* v. *Smith*, *supra*, was approved in *Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* v. *Monaghan*, 140 Ill., 474, where the act of Congress was referred to, which provides that the petitioner "may make and file a petition," etc., and requires that he "shall make and file therewith a bond with good and sufficient surety," etc., and where we said: "The third objection was that the bond filed was not the bond of the defendant. Upon hearing and argument the court held the objections to be good, and we think that its ruling was correct upon the authority of the case of *Weed Sewing Machine Co.* v. *Smith*, 71 Ill., 204." This disposes of the first error assigned by the appellant which we deem it necessary to notice.

*Second*—It is further claimed by the appellant that the court below erred in decreeing that the appellant be removed as trustee. Whether or not the decree was correct in ordering such removal depends upon the solution of the question whether the appellant was bound to comply with the requirements of the act of 1887, as amended

in 1889, regulating trust companies. Section 1 of said act, as amended, provides that "any corporation which has or shall be incorporated under the general incorporation laws of this state, being an act entitled 'An act concerning corporations,' and all amendments thereof, for the purpose of accepting and executing trusts, and any corporation now or hereafter authorized by law to accept or execute trusts, may be appointed assignee or trustee by deed, and executor, guardian or trustee by will, and such appointment shall be of like force as in case of appointment of a natural person."

Section 6 provides: "Each company, before accepting any such appointment or deposit, shall deposit with the auditor of public accounts for the benefit of the creditors of said company the sum of $200,000 in stocks of the United States, or municipal bonds of this state, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon," etc. (Session Laws of Ill. of 1889, p. 99.) Section 8 of the original act provides as follows: "It shall not be lawful for any such company to accept any trust or deposit as herinbefore provided after the passage of this act, without first procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with the requirements of this act in respect to such deposit." (Sess. Laws of Ill. of 1887, p. 145.)

The act of 1887 and the amendments to it made in 1889 refer to corporations organized under the laws of Illinois. But section 26 of the act of July 1, 1872, concerning corporations, provides as follows: "Foreign corporations and the officers and agents thereof, doing business in this state, shall be subjected to all the liabili-

ties, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." (2 Starr & Cur. Stat., p. 619.) The appellant, the Farmers' Loan and Trust Company, is a corporation, organized under the laws of the State of New York for the purpose of accepting trusts and for other purposes. The act of 1887, as amended in 1889, regulating trusts, is made, by section 26 of the general corporation act, to apply to foreign as well as domestic corporations which come within the terms of its provisions. So far as appellant stands related to the act of 1887, as amended in 1889, its position is not different from that of a domestic corporation. The inquiry then arises whether the appointment of the appellant as trustee under the trust deed, sought to be foreclosed by the bill herein, comes within the requirement of section 6 of said act of 1887, as amended in 1889. It is conceded that the appellant has never complied with said section 6 in the matter of depositing with the auditor of public accounts the sum of $200,000 in stocks, or bonds, or mortgages, as specified in said section.

It is said that the taking of a mortgage by a corporation to secure a debt to it is not within the prohibition of the statute, and that, as a trust deed is the same as a mortgage, a trust under a trust deed is not within the purview of the statute. The rule, however, that the statute does not apply to a mortgage or trust deed which is a mere security for a debt, includes only such mort-

gages or trust deeds as contain no special powers involving active trusts. The trust instrument, however, in the present case, imposes trust duties of an active character. This will readily appear by reference to the trust deed executed by the railroad company to the appellant and the American Trust and Savings Bank.

By the terms of the trust deed the trustees are required to certify the bonds to be issued, and to superintend their sale and application. Such action by the trustees under the mortgage or trust deed necessarily precedes the sale of the bonds to be issued, and the incurring of the indebtedness evidenced thereby. Interest does not commence to run, nor are payments to be made, until such certification takes place. It cannot be said, therefore, that the trust deed secures any indebtedness to the trustees, or any indebtedness actually existing to those represented by the trustees as the time of the execution of the trust deed. By the terms thereof the trustees are to certify and deliver 6,500 bonds, amounting in the aggregate to $6,500,000, to be first issued. The bonds are to be issued under the supervision of the trustees as follows: 1,000 to retire $12 of the 6 per cent. bonds of The Lake Street Elevated Railway Company—the old company. These bonds are to be reserved in the possession of the trustees and delivered only upon the retirement and canceling of the old bonds. That is to say, whenever any of said 6 per cent. bonds outstanding are paid or retired they are to be canceled, and the trustees are to certify and deliver to the railroad company, or its order, a proportionate number of the 1,000 thereby secured and reserved; 5,150 of the bonds are to be used in the acquisition of a right of way, and construction upon a designated route; 350 bonds are to be used forthe lawful purposes of

the company in the discretion of the directors. The 5,500 bonds last mentioned are to be certified and delivered by the trustees. Additional bonds are authorized as follows: 850 bonds for each additional mile of double track road fully equipped for building the same; for paying claims for damages from operation or construction; for procuring right of way; for paying interest on its bonds during the first two years of its operation; 500 bonds for each bridge built over the Chicago river. The bonds in addition to the 6,500 bonds are only to be issued by resolution or order of the board of directors of the railroad company, and the certificates of the president or vice-president and chief engineer of the railroad as to the existence of the facts, necessitating the issue of said additional bonds, together with certified copies of the resolution or order of the board of directors, are to be furnished to the trustee or trustees, and written orders, copies, resolutions and certificates are made sufficient and conclusive evidence to the trustees to a statement therein contained, and are to protect them in respect to a certification and delivery of any of said bonds thereunder. To assure the performance of these provisions, the trust deed provides as follows: "The said trustees, if they deem proper to do so, may appoint an agent of known integrity and business capacity, with full power to dismiss him and appoint another in his stead at pleasure, who shall have the right to attend all meetings of the board of directors, have free access to, and from time to time examine, all books of account of the party of the first part (the railroad company), appertaining to the application and expenditure of said proceeds of the sale of all of said bonds issued in excess of said 6,500 bonds, and shall make full report thereof to the trustees every

three months, and as much oftener as they may from time to time require for the information of the bondholders under this mortgage, and the railroad company shall pay said agent a reasonable compensation for his services during the time of the construction of said railroad, for which additional bonds are desired as aforesaid, not to exceed, however, $1,000 per annum." The trust deed further provides that, if default shall be made in the payment of the interest when the same becomes due when demanded, whether the same shall have continued for the period of six months or not, the trustee may, upon request of the holders of a majority in interest of the bonds then outstanding, enter into and take full possession of said railroad, and of all property thereby mortgaged, and hold, use, manage, maintain and operate the same and appoint such agents and managers as the trustees may see fit; collect and receive all revenues arising from such management and apply the same to the expenses of the trustees in the performance of the trust. The power of entering may be exercised as often as occasion may arise in the judgment of the trustees pending the trust, and they may continue to exercise the power as they may deem expedient, until the holders of a majority shall otherwise request.

The trust instrument further provides that the trustees shall permit such necessary changes to be made in the line of the railroad as may in their judgment be deemed advisable and advantageous. Insurance is to be effected satisfactory to the trustees, and policies are to be delivered to and kept by the trustees and to be made payable to them or to their successors. The mortgagor is to be allowed to sell parts of the mortgaged property upon consent of the trustees, who may release such property. The

instrument provides, however, that no portion of the main line or branches of the railroad or any part of the principal depots, stations or terminal facilities or other property, which in the judgment of the trustees may be essential to the due operation of the road, shall be released, unless replaced by property which, in the judgment of the trustees, is of equal value and benefit to the efficient operation of the road.

Section 1 of the act of 1887, as amended in 1889, provides that any corporation authorized by law to accept or execute trusts may be appointed trustee by deed. The charter of the appellant authorized it to accept and execute trusts, and it was appointed trustee by the deed now under consideration for the purpose of performing the active duties hereinbefore specified. In *Stevens* v. *Pratt*, 101 Ill., 206, it was held that the purpose of section 26 of the general incorporation act, as above quoted, was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law. In *Pennsylvania Ins. Co.* v. *Bauerle*, 143 Ill., 459, it was held that, under a devise to the Pennsylvania Company, and to certain other parties as trustees, the Pennsylvania Company had no power to act in this state, as such trustee, without compliance with the statute in question, which requires the deposit of $200,000 in stocks or other securities, etc. The facts in the case at bar bring it within the doctrine of the case of *Pennsylvania Ins. Co.* v. *Bauerle*, *supra*.

It is said, however, that section 26 of the general incorporation act refers only to foreign corporations "doing business in this state," and that the appellant was not doing business in this state. We do not think that the evidence bears out this contention.

In *Female Academy* v. *Sullivan*, 116 Ill., 375, it was held that receiving lands in this state by devise, and asserting ownership over them in this state, was a sufficient doing of business in this state, to bring a foreign corporation within the purview of the language of said section 26. So, also, in *Pennsylvania Ins. Co.* v. *Bauerle*, *supra*, it was held that, where the Pennsylvania Company, a foreign corporation, received land adjoining Chicago by devise, with power to sell and dispose of the same, and to lease it and collect the rents therefrom, and asserted in this state the ownership of said land, and assumed to sell and convey it, and brought suits in the courts of this state in respect to said lands and such alleged ownership, and for the enforcement of contracts in regard to the same, such company must be held to be doing business in this state within the meaning of said section.

In the present case the trustees under the deed of trust executed by The Lake Street Elevated Railroad Company certified and delivered 7,574 bonds of $1,000 each. From time to time, in 1894 and 1895, the appellant rendered and mailed to the railroad company bills for certifying bonds and accepting the deed of trust, and for services in the matter of the trust deed, and for receiving subscriptions, etc., which bills were received and paid by the railroad company. The trustees exercised constant supervision over the application of the bonds as issued. Correspondence was carried on between the railroad company and the appellant in reference to questions arising in regard to the issuance and delivery of bonds, and in regard to releases and accounts. On August 7, 1894, the appellant appointed an agent under the trust deed, who did a large amount of business in behalf of the appellant in Chicago, as such agent. This appointment was ratified

and accepted by the railroad company by resolution of its board of directors. The agent accepted the agency, and frequently examined the books of the mortgagor, and looked after the issuance and application of the several lots of authorized bonds. He made reports as agent to the appellant and to the American Trust and Savings Bank. He gave advice in reference to the questions in dispute which arose between the appellant and the railroad company from time to time. From these and other facts appearing in the record, which it is not necessary here to specify, it is manifest that the appellant was doing business in the State of Illinois within the meaning of said section 26.

We are of the opinion that the court below did not err in decreeing that the appellant company should be removed as trustee upon the ground of its non-compliance with section 6 of the act of 1887, as amended in 1889, regulating trust companies. It is unnecessary to consider any of the other grounds mentioned, as justifying the act of the court below in removing said trustee.

*Third*—It is further contended on the part of the appellant that the court below erred in entering the decree appealed from without requiring all the bondholders to be made parties to the suit. We think that, under the circumstances of this case, this contention is without force.

It is true, as a general rule, that all parties interested in the subject-matter of the suit should be made parties, and that, when foreclosure is sought of a mortgage or deed of trust, the *cestuis que trustent*, as well as the trustee, should be made parties, but there are two well-established exceptions to this rule. The first is, that, where the absent parties are properly represented, it is sufficient

to make such representatives parties to the suit. In *Hale* v. *Hale*, 146 Ill., 257, we said: "When it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him." Jones on Corporate Bonds and Mortgages (Sec. 398) says: "A trustee for bondholders represents their interests, and, when made a party to a suit affecting their interests, they are as much bound by the decree rendered in the suit as if they were individually made parties to the suit."

Another exception to the rule is that, where the beneficiaries are very numerous, so that the delay and expense of bringing them in becomes oppressive and burdensome, they will not be deemed necessary parties, where the trustee or trustees representing them are made parties. In *Chicago, etc., Land Co.* v. *Peck*, 112 Ill., 408, we said (p. 435): "Objection is taken that there were other necessary parties not made parties to the several bills—that all the *cestuis que trust*, to wit, the bondholders under the Jewett trust deed, should have been made parties by name. The general rule is, that all persons interested in the subject-matter of the suit are to be made parties, and that the *cestuis que trust*, as well as the trustee, should be made parties to a foreclosure proceeding: but there is an established exception to this rule where the beneficiaries are very numerous, and certain parties to the suit are entitled to be deemed their full representatives. It has been laid down by Lord Redesdale as a general rule that where any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or as defendants, without bringing before the court the creditors or legatees for whom they are trustees, which in many

cases would be impossible. Indeed, the impracticability of making the other persons parties would seem of itself a sufficient ground for dispensing with them. (Story's Eq. Pl., Sec. 150.) In *Van Vechten* v. *Terry*, 2 Johns. Ch., 197, where a demurrer was filed to a bill brought by trustees, without making the *cestuis que trust*, two hundred and fifty in number, parties, Chancellor Kent, in overruling the demurrer, said: 'The trustees are sufficient for the purpose of this bill, which is for a sale of the pledge. It would be intolerably oppressive and burdensome to bring in all the *cestuis que trust*. The delay and the expense of such a proceeding would be a reflection on the justice of the court. This is one of those cases in which the general rule cannot and need not be enforced, for the trustees sufficiently represent all the interests concerned; they were selected by the association for that purpose, and we need not look beyond them.' (And see *Shaw et al.* v. *N. C. R. Co. et al.*, 5 Gray, 162; Story's Eq. Pl., Secs. 142, 216, 217.) We regard the present as a clear case within the exception to the general rule of equity pleading, that all persons interested in the subject-matter of the suit must be made parties to the bill."

In *St. Louis and Peoria Railroad Co.* v. *Kerr*, 153 Ill., 182, which was a suit to enforce a lien against a railroad company, and where the Central Trust Company of New York was made a defendant, it was insisted that the court was without jurisdiction to render a decree, because certain bondholders were not made parties defendant, but we there said (p. 196): "It is a general rule in chancery that all persons interested in the subject-matter of the suit should be made parties, and that, in the case of foreclosure of a deed of trust, the *cestuis que trust*, as

well as the trustee, should be made parties. But where the beneficiaries are very numerous, and they are represented by the trustee, and the bonds secured by the deed of trust are transferable by delivery only, they are not necessary parties. * * * The trust company assumed to act for the bondholders, and, if it desired them to be made parties, it was its duty to then have disclosed their names, and made the request to the Circuit Court. Not having done so, the presumption is that it had authority to act."

Applying the rules thus laid down to the facts of the present case, we find that the bondholders who were not made parties to the suit in person are properly represented, so as to insure a protection of their interests. The two trustees in the trust deed now under consideration, to-wit, the appellant, the Farmers' Loan and Trust Company, and the appellee, the American Trust and Savings Bank, are parties defendant to the suit. They represent the interests of all the absent bondholders in a general way. It is to be remembered that, by the terms of the trust deed in this case, the trustees are authorized to foreclose the mortgage or trust deed. It is also provided in the trust deed that every holder of the bonds thereby secured accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, under the trust deed, is vested exclusively in the trustees; and it is further therein provided that under no circumstances, shall the holder of any bonds or coupons, or any part of such holders, have any right to institute any action at law upon any coupon or coupons or otherwise, or any suit or proceedings in equity or otherwise, for the purpose of enforcing payment, etc., or to foreclose said mortgage, except in

case of refusal by the trustees to perform the duty imposed on them. In addition to this, it is conceded that, of the 7,574 bonds issued, the appellee, the Northern Trust Company, one of the defendants below, is the holder of 6,594 of said bonds. The Northern Trust Company thus appears in the suit as the representative of a large majority of the bondholders. It also appears clearly, from the evidence, that one Ziegler and his associates, holding 610 of the bonds, are represented by the appellant, the Farmers' Loan and Trust Company, and by the counsel appearing for appellant in this case. As to the remaining 250 of the bondholders, they are represented by the trustees in the trust deed, who were defendants in the court below. Their number corresponds exactly with the number of the *cestuis que trustent*, to-wit, 250, named in *Van Vechten* v. *Terry*, 2 Johns. Ch., 197, quoted in *Land Co.* v. *Peck*, *supra*, as to which number it was there said that the trustees were sufficient representatives thereof for the purposes of a bill asking a sale of the pledge or mortgaged property.

Some other points are urged against the correctness of the decree entered by the court below, but they are unimportant, and we do not deem it necessary to enter into a discussion of them. What is said above sufficiently disposes of the material opposition made by counsel to the decree of the trial court.

The judgment of the Appellate Court and the decree of the Superior Court are affirmed.

*Judgment Affirmed.*

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

I, Christopher Mamer, elected clerk of the Supreme Court, in and for the Northern Grand Division of the State of Illinois, and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Supreme Court in the above entitled cause, of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme Court, at Springfield, June 18, 1898.

C. MAMER,

[SEAL.] *Clerk of the Supreme Court.*